



**In the
Supreme Court of the United States.**

OCTOBER TERM, 1978.

No. . 78-966

JACKIE DAVID MILLER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the First Circuit.**

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**UNITED STATES OF AMERICA,
RESPONDENT.**

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the First Circuit.**

Jackie David Miller petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on November 15, 1978.

Opinions Below.

The Court of Appeals issued an opinion, not yet reported, on November 15, 1978. The opinion is reproduced in the Appendix at pp. 29a-68a. The District Court for the District of Maine issued findings of fact and conclusions of law in denying petitioner's motion to suppress. That opinion is reproduced in the Appendix at pp. 1a-28a.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 15, 1978 (App. 29a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented.

Whether consideration of a defendant's failure to confess or to cooperate with the government, when determining the length of sentence to be imposed, unjustifiably penalizes the exercise of his rights under the Fifth Amendment to the Constitution.

Constitutional Provision Involved.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case.

On May 13, 1977, employees of a marina in Arrowsic, Maine, discovered a yacht fouled in one of the marina's moorings. Since the boat was unknown to them and apparently abandoned, the marina employees notified the Coast Guard who, in turn, notified local police (App. 30a-31a).¹ Concerned about a possible drowning and suspecting a drug smuggling operation, the police arranged for divers and called the Drug Enforcement Administration (App. 31a). The next morning, two local officers examined the interior of the boat and discovered the remains of marijuana cigarettes and a chart with a course pencilled in, leading toward a small, privately owned peninsula known as Mill Isle (App. 31a-32a).

Petitioner arrived at the marina soon afterward and identified himself as the owner of the yacht to a marina employee, but left the marina immediately without arranging to rent a mooring. Police officers pursued him and brought him and his truck back to the marina, where he was questioned by local officers and agents of the Drug Enforcement Administration (App. 32a-33a). Marijuana debris was observed in petitioner's truck and a small cube of hashish was found in his luggage. Petitioner was then formally arrested (App. 33a-34a).

Alerted by the chart found on the yacht, police officers and Drug Enforcement Administration agents then went to the Mill Isle property where they found marijuana debris on the dock and a bale of marijuana under a tarpaulin near a drive connecting the cottage with the main house (App. 35a). The law enforcement officers then obtained and executed a search warrant for the Mill Isle property and found sixty bales of marijuana in the cottage (App. 36a).

¹ The summary of facts is drawn from the opinion of the Court of Appeals for the First Circuit, App. 29a-68a.

Petitioner was charged with importing marijuana and aiding and abetting its importation in violation of 21 U.S.C. §§ 952(a), 960(a)(1), and 18 U.S.C. § 2, possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1), and possession of hashish in violation of 21 U.S.C. § 844(a) (App. 29a-30a). After a trial by jury, petitioner was found guilty on all counts and sentenced to concurrent maximum terms of five years, five years and one year, respectively (App. 30a).

At sentencing, the trial court placed primary emphasis on the fact that petitioner had not confessed his guilt and had not cooperated with the government. The court's remarks at sentencing were, in full, as follows:

"In determining the sentences appropriate in this case, this Court has considered with care the very comprehensive and thorough presentence report prepared for its consideration; it has considered the statement very ably made by the United States Attorney as to the factors which this Court should appropriately consider, and also has, of course, considered the very able statement by the defendant's counsel, Mr. Petruccelli.

"The Court has also had the benefit of having personally presided at the trial of this defendant as a result of which the Jury returned its unanimous verdict of guilty under all three counts of the Indictment.

"At the outset, the Court is wholly convinced that the Jury arrived at the only verdict which it could have arrived in this case. There is not the slightest doubt in the mind of this Court of this defendant's guilt of all three of the charges in this Indictment. The Court is further concerned because in light of all the information concerning the defendant which has developed at the trial and in the subsequent investigation, it is entirely evident that this

defendant is simply the tip of the iceberg; that he is one in what unquestionably must have been and very possibly may still be a very substantial criminal operation directed toward the importation of Marijuana and very possibly other elicit [*sic*] drugs into this country through the coastline of the State of Maine.

"This Court cannot in determining the sentence appropriate in this case close its eyes to the fact that the defendant, despite the overwhelming evidence of his guilt, continues to deny guilt. The first step in rehabilitation, whether it be in an institution or probationary sentence setting, is, of course, the defendant's full, frank and complete admission that he has done wrong and is prepared to do better in the future.

"The Court also can't close its eyes to the fact that the defendant has consistently declined to co-operate in any way with the prosecuting and investigating officials in their efforts to bring into Court all of those who are involved in this very substantial operation. The sums of money involved in this operation, as disclosed at the trial, [are] clearly beyond any capacity of this particular defendant before the Court. He is undoubtedly aware of the sources of those funds. He has consistently declined and refused to co-operate in determining what that source may be.

"The Court is, of course, aware that the defendant is under no obligation to in any way incriminate himself. He was entitled to a trial. He has had a fair trial. His guilt has been determined. The Court feels compelled to impose the maximum prison term provided by the statutes for each of the three counts in this Indictment, in two instances including the special parole term of at least two years required by the applicable statute. The Court has considered the possibility of a young adult sentence

under the Federal Youth Corrections Act, but in light of the magnitude of this offense, the defendant's evident sophistication, including, if the Court has previously not mentioned, his prior criminal record, the Court does not feel he is an appropriate subject for treatment under the Act." (App. 64a-65a, n.18.)

On appeal, the Court of Appeals for the First Circuit ruled that resentencing was not required in this case. The Court of Appeals reaffirmed the principle that the exercise of the Fifth Amendment rights to silence and to an appeal of a conviction cannot be burdened by imposing longer sentences when those rights are exercised (App. 66a), and also recognized that there was a difference of opinion amongst the Circuit Courts of Appeals "concerning the extent to which a trial court may rely upon a defendant's failure to 'repent' and 'sing' when fixing sentence" (App. 66a). However, the Court of Appeals distinguished the case at bar on the grounds that the trial court had not engaged in open bargaining with petitioner by expressly conditioning a reduced sentence upon confession and cooperation, that it could therefore be concluded that the trial court had considered the lack of repentance and cooperation only as indicative of a lack of rehabilitative potential rather than as a basis for enhanced punishment, and that reliance on the failure to confess was justified by its value as an indicator of nonrehabilitation, citing this Court's opinion in *United States v. Grayson*, ___ U.S. ___, 98 S. Ct. 2610 (1978) (App. 66a-67a). The Court of Appeals also relied on the fact that the trial court had articulated other reasons for the maximum sentence in addition to petitioner's failure to confess (the magnitude of the offense and petitioner's previous conviction) which "allays any fears we might have that the sentencing decision was tainted by impermissible considerations" (App. 68a).

Reasons Why the Writ Should be Granted.

THE QUESTION PRESENTED BY PETITIONER'S CASE IS A RECURRENT AND IMPORTANT CONSTITUTIONAL ISSUE IN THE ADMINISTRATION OF CRIMINAL JUSTICE AND ONE WHICH HAS DIVIDED THE CIRCUIT COURTS OF APPEALS.

To guarantee the rights conferred by the Constitution, the exercise of those rights must be free of penalty or punishment. In the context of the Fifth Amendment, this Court has been quick to condemn any burden placed on the free exercise of the citizen's right not to be compelled to testify against himself, whether the penalty for refusing to waive the Fifth Amendment privilege be the loss of livelihood (*Spevack v. Klein*, 385 U.S. 511 (1967)), a procedural default at trial (*Brooks v. Tennessee*, 406 U.S. 605 (1972)), adverse evidentiary presumptions (*Griffin v. California*, 380 U.S. 609 (1965)), or direct criminal penalties (*Haynes v. United States*, 390 U.S. 85 (1968)). In this case, the trial court sentenced petitioner to the maximum term on each count. A principal determining factor, indeed the critical factor, in the court's decision to impose the maximum penalties was the fact that petitioner had not admitted his guilt or cooperated with the government by identifying others involved in the offense. Petitioner thus "paid a judicially imposed penalty for exercising his constitutionally guaranteed rights." *Thomas v. United States*, 368 F. 2d 941, 946 (5th Cir. 1966). The question which requires resolution by this Court is whether imposition of this penalty is consistent with the mandate of the Fifth Amendment.

The Circuit Courts of Appeals have taken differing views of the extent to which a sentencing court may rely upon a defendant's failure to confess or cooperate with the government in reaching a sentencing determination. The Third, Fifth and District of Columbia Circuits have ruled that when the de-

fendant's refusal to waive his Fifth Amendment rights influences the length of the sentence, a constitutionally impermissible penalty has been imposed on the exercise of those rights and resentencing is required. See, e.g., *United States v. Garcia*, 544 F. 2d 681 (3d Cir. 1976); *Thomas v. United States*, 368 F. 2d 941 (5th Cir. 1966); *Scott v. United States*, 419 F. 2d 264 (D.C. Cir. 1969).² The Second, Seventh and Ninth Circuits, on the other hand, have ruled that consideration of a defendant's lack of explicit repentance does not penalize his exercise of Fifth Amendment rights, at least where a sentence substantially less than the maximum has been imposed. These Circuits consequently have not required resentencing when the lack of a confession influenced the sentencing decision. See, e.g., *United States v. Floyd*, 496 F. 2d 982 (2d Cir. 1974), *cert. denied sub nom. Miller v. United States*, 419 U.S. 1069 (1974); *United States v. Santiago*, 582 F. 2d 1128 (7th Cir. 1978); *Gollaher v. United States*, 419 F. 2d 520 (9th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969).

In this case, the Court of Appeals for the First Circuit recognized the threat to Fifth Amendment rights occasioned by imposition of a longer sentence on a defendant who refuses to confess his guilt, as well as the division in the Circuit Courts of Appeals as to when an impermissible price for exercising those rights has been paid. Nonetheless, the court below aligned it-

² Imposing a longer sentence based on the defendant's refusal to confess guilt impinges upon both the privilege against compulsory self-incrimination and the right to an unfettered appeal. *Thomas v. United States*, 368 F. 2d at 945. See also, *LeBlanc v. United States*, 391 F. 2d 916, 918 (1st Cir. 1968). In addition, basing sentence on a lack of cooperation with the government in identifying other participants in the offense also implicates the privilege against self-incrimination, since identifying others necessarily includes admitting one's own role in the offense. *United States v. Rogers*, 504 F. 2d 1079, 1085 (5th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

self with the Second, Seventh and Ninth Circuits and affirmed petitioner's maximum sentences.³

The First Circuit justified the penalties imposed on petitioner on the ground that when, as here, the sentencing court does not engage in an express attempt to bargain with petitioner or explicitly condition a lighter sentence on a confession, a distinction can be drawn between imposing a longer sentence because a defendant refuses to waive his Fifth Amendment rights and imposing a longer sentence because a lack of rehabilitative potential is inferred from the refusal to waive Fifth Amendment rights. The Court of Appeals concluded that such evidence of nonrehabilitation is useful to an informed sentencing decision, citing this Court's recent decision in *United States v. Grayson*, ___ U.S. ___, 98 S. Ct. 2610 (1978) (hereafter cited as *Grayson*).

In effect, the Court of Appeals has ruled that the usefulness of the evidence of nonrehabilitation derived from the lack of a confession outweighs the penalty which is necessarily inflicted on a nonconfessing defendant's exercise of his rights if the sentence is enhanced on this ground. The Court of Appeals' reasoning thus raises significant questions concerning the logi-

³ The Seventh and Ninth Circuits have affirmed sentences despite the influence of the defendant's refusal to confess only when the sentences imposed were substantially less than the maximum. See, e.g., *United States v. Santiago*, 582 F. 2d 1128 (7th Cir. 1978) (sentence imposed only one-third of the maximum); *United States v. Thompson*, 476 F. 2d 1196 (7th Cir. 1973) (five year sentence, ten year maximum); *United States v. Lehman*, 468 F. 2d 93 (7th Cir. 1972), *cert. denied*, 409 U.S. 967 (1972) (three year sentence, five year maximum); *United States v. Chaidez-Castro*, 430 F. 2d 766 (7th Cir. 1970) (three year sentence, five year maximum); *Gollaher v. United States*, 419 F. 2d 520 (9th Cir. 1969) (two year sentence, five year maximum). Strictly speaking, only the Second Circuit has taken the position adopted by the First Circuit here, that no penalty for exercising Fifth Amendment rights has been imposed even though a maximum sentence has been imposed. See, *United States v. Vermeulen*, 436 F. 2d 72 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971).

cal and constitutional validity of the distinctions it has drawn and whether this Court's reasoning in *Grayson* can or should be extended to require that the protections traditionally accorded the privilege against self-incrimination give way to the need for this type of evidence in determining sentence.

In ruling that no impermissible penalty on the exercise of Fifth Amendment rights has been imposed when the sentencing court merely considers a defendant's lack of repentance and does not expressly bargain for a confession in return for leniency, the court below assumes that the implicit condition imposed by a court's statement of its policy or intent with regard to unrepentant defendants exacts a lesser price from the defendant than explicitly conditioning leniency on a confession of guilt. This assumption overlooks the logical fact that in both instances the same condition has been imposed and that the same penalty — a longer sentence — flows from the failure to meet the condition. Since the longer sentence can be avoided only by relinquishing Fifth Amendment rights, the same constitutional price has been paid for exercising those rights, whether the sentencing court affords the defendant a new *locus poenitens* or not. The maximum sentences which follow such statements of policy or intent have, therefore, been considered just as damaging to the exercise of Fifth Amendment rights as those following more overt requests for confessions. See, e.g., *United States v. Hopkins*, 464 F. 2d 816, 822 (D.C. Cir. 1972) ("My chief concern . . . is you don't even have any remorse for your actions. . . . The first step to rehabilitation is remorsefulness").⁴

⁴ Conversely, those Circuits which have found no impermissible penalty in sentences based upon the defendant's failure to confess have done so both in cases of explicit bargaining and in cases where the sentencing court has merely considered the lack of repentance in reaching a sentencing determination. Compare *United States v. Chaidez-Castro*, 430 F. 2d 766 (7th Cir. 1970) with *Gollaher v. United States*, 419 F. 2d at 529, and *United States v. Santiago*, 582 F. 2d at 1136-1137.

The First Circuit's opinion also assumes that a distinction can be drawn between imposing a longer sentence because the defendant has refused to waive his Fifth Amendment rights and imposing a longer sentence because the sentencing court infers a lack of potential for rehabilitation from the refusal to waive Fifth Amendment rights. However, for purposes of assessing the impact of a sentence on the assertion of Fifth Amendment rights, the distinction results in no practical or logical difference. In both cases, the longer sentence is ultimately predicated on the defendant's refusal to waive his rights and in both cases the same price is paid for that refusal. The impact on the defendant's Fifth Amendment rights is therefore identical, whatever distinctions are drawn in the mind of the sentencing judge.

The First Circuit's reliance on the distinction between imposing a longer sentence for exercising Fifth Amendment rights and imposing a longer sentence because the court infers a lack of rehabilitation from the refusal to waive those rights rests upon the assumption that a defendant's refusal to confess has as much evidentiary value as an indicator of his prognosis for rehabilitation as an affirmative act of confession. However, an inference of nonrepentance cannot be drawn from the fact of nonconfession as easily as repentance can be inferred from confession. Those, like petitioner, who refuse to confess or cooperate after they have been found guilty at trial may be thoroughly penitent, but justifiably determined not to incriminate themselves further — a right which is secured by the Fifth Amendment to the Constitution to the guilty as well as the innocent — or determined to secure review of a conviction obtained in violation of other rights guaranteed by the Con-

stitution.⁵ In short, a refusal to confess is ambiguous and cannot support an inference of nonrehabilitation.

The Court of Appeals' reliance on this Court's decision in *Grayson* is therefore misplaced. In *Grayson* this Court found that a defendant's willingness to lie on the witness stand at trial provided "precise and concrete" information about his character (*id.* at 2616), which was of sufficient value to the sentencing decision to outweigh the risk that the defendant was being punished without due process for the crime of perjury. *Id.* at 2617. In this case, the refusal to confess does not, in fact, provide any information about the defendant's state of rehabilitation and therefore does not have sufficient evidentiary value to outweigh the punitive effect which a sentencing decision based on the lack of confession inevitably has on the exercise of a defendant's rights under the Fifth Amendment.

In any case, the First Circuit's implicit assumption that the reasoning in *Grayson* supports a ruling that the predictive value of the refusal to confess justifies the corollary effect of heavier punishment of those who exercise their Fifth Amendment rights extends this Court's reasoning in *Grayson* far beyond its factual and constitutional premises. The right which the defendant in *Grayson* claimed had been penalized by the heavier sentence was not the Fifth Amendment privilege, but a statutory right to testify on his own behalf or, at best, a constitutional right inferred from the Sixth Amendment right to present a defense. This Court found that there was no statutory or constitutional right to testify *falsely* and consequently that no impermissible penalty had been imposed. *Id.* at 2618. There is thus no intimation in *Grayson* that the balancing analysis employed in ruling on the due process viola-

⁵ As Judge Bazelon pointed out in *Scott v. United States*, 419 F. 2d at 268, a defendant "could reasonably have believed that he could show penitence — real or affected — only at the price of prejudicing his appeal, if not worse."

tion would be extended in general to penalties imposed on the exercise of rights specifically guaranteed by the Constitution, or that such an analysis would be extended to penalties imposed on the assertion of Fifth Amendment rights in particular. Thus, the question of whether, as the First Circuit seems to have assumed, the rationale of *Grayson* can or should be extended to the Fifth Amendment context remains a substantial constitutional question which should be resolved by this Court.⁶

In view of the continuing divergence of views in the Circuit Courts of Appeals concerning the constitutional propriety of predicated sentence on a defendant's refusal to waive his rights under the Fifth Amendment,⁷ and in view of the need

⁶ The Court of Appeals found additional justification for exempting this case from the fundamental rule that a price tag may not be placed on the exercise of constitutional rights on the ground that other factors in addition to petitioner's refusal to waive his Fifth Amendment rights influenced the sentencing decision, even though the District Court's remarks were concerned almost exclusively with petitioner's failure to confess or implicate others as well as himself. This position is also not supported by the decisions of this Court, which have established that resentencing is required when it appears that an improper consideration has influenced the sentencing decision, even if only in part. In *Townsend v. Burke*, 334 U.S. 736 (1948), the Court ruled that prior convictions obtained without benefit of counsel could not be considered in reaching a sentencing determination and remanded for resentencing, since "[w]e are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence . . ." *Id.* at 740. This Court also remanded for resentencing in *United States v. Tucker*, 404 U.S. 443 (1972), when it appeared that the sentence was based in part upon prior unconstitutional convictions. See also, *United States v. Hopkins*, 464 F. 2d 816, 822 (D.C. Cir. 1972), and *United States v. Rodriguez*, 498 F. 2d 302, 313 (5th Cir. 1974), requiring resentencing where the appellate court was unable to appraise the extent to which the defendant's failure to confess influenced the disposition.

⁷ In addition to the numerous cases already cited, the question has reached the Courts of Appeals on the following occasions (the list is not, however, exhaustive): *United States v. Wright*, 533 F. 2d 214 (5th Cir. 1976); *United States v. Laca*, 499 F. 2d 922 (5th Cir. 1974); *United States v. Jansen*, 475

for clarification of the significance of this Court's recent opinion in *United States v. Grayson* in the Fifth Amendment context, the petitioner's case presents a recurrent and troubling constitutional issue in the administration of criminal justice which requires definitive resolution by this Court. *Cf. Linkletter v. Walker*, 381 U.S. 618, 620 (1965).

Conclusion.

The petition for certiorari should be granted.

Respectfully submitted,
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December 15, 1978.

F. 2d 312 (7th Cir. 1973), *cert. denied*, 414 U.S. 826 (1973); *United States v. Kimbrell*, 470 F. 2d 280 (5th Cir. 1972); *Bertrand v. United States*, 467 F. 2d 901 (5th Cir. 1972); *United States v. Moore*, 427 F. 2d 38 (5th Cir. 1970), *cert. denied*, 400 U.S. 965 (1970); *United States v. Wiley*, 278 F. 2d 500 (7th Cir. 1960); *cf. United States v. Floyd*, 477 F. 2d 217 (10th Cir. 1973), *cert. denied*, 414 U.S. 1044 (1973); *Williams v. United States*, 273 F. 2d 469 (10th Cir. 1959).

Appendix. United States District Court District of Maine

CRIM. No. 77-37-SD

UNITED STATES OF AMERICA

v.

JACKIE DAVID MILLER

December 13, 1977

George J. Mitchell, U. S. Atty., Portland, Me., for plaintiff.
Gerald F. Petruccelli, Portland, Me., for defendant.

Memorandum of Opinion and Order on Defendants Motion to Suppress

GIGNOUX, District Judge.

Presently before the Court is defendant's motion for return of property and for suppression of evidence filed July 29, 1977 pursuant to Fed.R.Crim.P.12(b)(3) and 41. An evidentiary hearing has been held, the issues have been comprehensively briefed and argued by counsel, and the following memorandum opinion contains the Court's findings of fact and conclusions of law as required by Fed.R.Crim.P.12(g).

*The Facts**A. Events of Friday, May 13, 1977*

On Friday, May 13, 1977, at approximately 5:45 a.m., Willard Muise, an employee at the Robinhood Marina, in Arrowsic, Maine, noticed a yacht, the Cold Duck, fouled in one of the marina's moorings approximately 250 yards offshore. Muise had not previously seen the craft. At about 7:00 a.m. on the same day, Muise conferred with Ralph Becker, the marina owner, who also knew nothing about the boat. Later in the day Robert Mansfield, an employee of the marina, and Becker also conferred about the boat and decided to discover the identify of the owner. To that end, Mansfield called the home port of the Cold Duck, found the marina at which it formerly had been based, and learned from personnel at the marina the name and telephone number of the former owner, Patrick Zecco. Mansfield later was able to reach Zecco, who told Mansfield that he had sold the boat to a person named Jackie Miller.

At approximately 2:45 p.m. William Muise rowed out to and boarded the Cold Duck. No one was aboard, and Muise returned to the marina. Because the boat was fouled in a mooring, and since the rubber dinghy aboard the Cold Duck used to ferry people from the boat to the shore had not been used for some time, Muise told Mansfield he feared a drowning might have occurred. At about 3:30 p.m. Mansfield telephoned the United States Coast Guard station at Boothbay Harbor and advised them of the events at the marina. Mansfield then left work for the day.

Sometime thereafter, the Coast Guard arrived at the marina to investigate the possibility of a nautical accident. The Coast

Guard notified the Sagadahoc County Sheriff's Office of the incident. Pursuant to this notification, Sagadahoc County Chief Deputy Sheriff Charles Brawn arrived at the marina at approximately 5:30 p.m. No one was at the marina investigating the reported drowning, so Brawn departed. Brawn returned to the marina around 8:00 p.m. that evening. By that time the Coast Guard, Maine State Police, Sagadahoc County Sheriff Arthur Tainter, wardens from the Maine Department of Sea and Shore Fisheries, and marina owner Becker were at the scene probing the purported drowning.

Some two to two and one-half hours after he returned to the marina (at 10:00 or 10:30 p.m.), Brawn and Coast Guard officers boarded the Cold Duck in order to discover evidence of ownership. A search of the vessel was made, and the officers found a bill of sale and registration papers for the boat listing Jackie D. Miller as owner and Post Office Box 42 in Woolwich, Maine as his address of record. Later during the evening, after the search of the boat had been completed, Becker stated to several law enforcement officers that he suspected there had been some drug smuggling in the area, and he mentioned the name "Purmont."¹ Brawn, however, was not a party to these conversations and did not hear any discussion of drugs or drug smuggling or any mention of the name "Purmont." The Coast Guard later contacted the former owner, Patrick Zecco, and learned that Miller had paid \$19,500 cash for the boat, mostly in small bills, which had been delivered in a brown paper bag. Miller had requested a receipt listing the purchase price as only \$15,000.

Everyone left the marina toward midnight. Before departing, Sheriff Tainter informed the Coast Guard that he would

¹ In 1974 Becker had cooperated with law enforcement officers in an investigation of suspected drug smuggling activities in the area by a man named Purmont.

arrange for divers to be at the marina the following morning. The Sheriff's office ordered Deputy Sheriff Frederick J. White, who went on duty at midnight, to check the boat once an hour to make sure that the boat was secure and that no one was tampering with her. White did so until his shift officially ended at 8:00 a.m., May 14.

B. Events of Saturday, May 14, 1977

1. Prior to the Mill Isle Visit

Shortly after midnight, Deputy Brawn attempted to telephone Drug Enforcement Agency (hereinafter D.E.A.) Special Agent Edward V. Drinan, Jr., the agent in charge of D.E.A. operations in Maine. Brawn suspected that the Cold Duck might be involved in drug operations allegedly taking place in Westport, Lincoln County, Maine. Brawn was unable to complete the call to Drinan.²

At 12:30 a.m., May 14, without knowledge of Brawn's actions, a Coast Guard warrant officer, who had attended drug "awareness" seminars conducted by Drinan for the Coast Guard, also telephoned Drinan. The warrant officer reported the peculiar facts thus far discovered about the Cold Duck and said that he was "suspicious" of the situation. Drinan stated that he would proceed to the marina the next day. Around 4:00 a.m. Drinan received a message from the Boston D.E.A. office to call the Sagadahoc County Sheriff's Office. At 8:00 a.m., the Sheriff's Office called Drinan, who replied that he was aware of the purported drowning and was proceeding to Robinhood Marina. Before heading to the marina, Drinan stopped at his office to pick up his handcuffs and his field kit,

²Brawn's information about drug operations in Lincoln County later proved to be erroneous.

which contained *Miranda* forms, evidence envelopes, and similar matter. Drinan at this time and at all times subsequent was acting in his official capacity as a D.E.A. Special Agent.

Toward 9:00 a.m. Deputy White returned to the marina to learn of progress in the investigation of the accident. There White met Deputy Sheriff Gordon E. Kinney, the deputy in charge of criminal investigation. The Sheriff's Office had contacted Kinney in the event that foul play somehow had been involved in the purported drowning. At this time divers were working the waters beneath the boat and around the marina. White and Kinney boarded the Cold Duck to help Coast Guardsmen tow the boat back to the gas dock at the marina. While aboard, the men noticed several thousand dollars worth of new electronic navigational gear, which had been installed in a sloppy, unprofessional fashion. White and Kinney also noticed three to five partially burned marijuana cigarettes in an ashtray on the deck and on the flying bridge.

Kinney noticed a navigational chart (Government Exhibit 8), folded so that the printed part of the chart was exposed, lying on the floor of the main cabin between a table and a bench. He spread the chart on the table and observed a penciled course line on the chart threading its way from Robinhood to a ledge located off Mill Isle. White and Kinney discussed the course in general terms and did not specifically refer to Mill Isle.³ White and Kinney did not engage in a general search of the boat, and the objects they spotted on the Cold Duck were in plain view.

At 9:00 a.m., Deputy Brawn arrived at the marina. After the Cold Duck was towed to the dock, while White and Kin-

³ Kinney testified that he had previously been to Mill Isle on May 11, 1977 in an attempt to serve papers on a man and a woman in connection with a check-cashing matter. He was unable to effect service, and the incident bore no relation to the Cold Duck affair.

ney were still aboard, Brawn boarded the boat. White and Kinney showed him the chart with the course line. The three speculated about possible involvement of the Cold Duck with the purported drug activities in Lincoln County. While Brawn, White and Kinney were conferring on the Cold Duck, a young man later identified as the defendant, Jackie D. Miller, drove into the marina parking lot. The time was approximately 10:00 a.m. Miller's vehicle was a late model, black Chevrolet Blazer. Marina employee Muise was working in the lot at the time. Miller approached Muise, gave his name as Miller, and stated that he wished to lease a mooring for his boat. When Muise asked the defendant what type of boat he owned, the defendant pointed to the Cold Duck and noticed the law enforcement officers on her. Defendant inquired about their presence, and Muise answered that the men had taken the boat to the dock in order to free the mooring. Muise suggested that the defendant check with the office about moorings and then walked away.

Shortly thereafter Muise went down to the Cold Duck and asked if defendant had been there. Defendant had not. After procuring a description of defendant and his vehicle, Deputy White, in his Sheriff's Department automobile, and Deputies Kinney and Brawn in a separate car, left the marina to locate the defendant. In Georgetown Center White passed defendant heading in the opposite direction. The two had eye contact, and defendant accelerated rapidly. White turned around and gave chase. To catch defendant White traveled at speeds near 90 m.p.h. With his lights and siren operating, White caught up with defendant after 1½ to 2 miles and tailed defendant for another mile at 70 m.p.h. before defendant stopped his vehicle. The road was two lanes, narrow and winding. The speed limit was unposted but was statutorily set at 45 m.p.h. Defendant produced his license and the vehicle registration for White, and in response to a question, defend-

ant told White that he owned the Cold Duck. Defendant agreed to accompany White back to the marina. Brawn and Kinney pulled their car in behind White on the way to the marina.

At the marina parking lot, Brawn began to question defendant. Defendant admitted that he owned the Cold Duck, but refused to state why he had left the marina so abruptly. Brawn then read defendant his *Miranda* rights from White's *Miranda* warning card. Defendant agreed to speak without a lawyer. Sheriff Tainter next arrived. Defendant said that ownership papers were on the boat and voluntarily accompanied Brawn and Tainter aboard the Cold Duck. Within a few minutes of their boarding the Cold Duck, shortly before 11:00 a.m., Agent Drinan arrived at the marina, was briefed by Brawn, and also boarded the boat. Drinan identified himself to defendant by telling defendant his name, title, and reason for being at the marina. Drinan said that he had reason to believe that defendant and his boat had been engaged in drug smuggling activity. Drinan observed two burned marihuana cigarettes in an ashtray in the cabin.

While Drinan was talking with defendant aboard the Cold Duck, White and Kinney were in the marina parking lot "admiring" defendant's Blazer. Deputy Sheriff Bruce E. Settler joined the two in the lot, and he too admired the vehicle. Defendant had left open the door on the driver's side of the Blazer. As the three deputies peered in through the door to examine the instrument panel, they observed what they suspected to be marihuana debris on the front floor of the Blazer. Settler saw more debris in the back seat area. Settler gathered debris from both parts of the Blazer, field-tested the substance, and learned that it was marihuana. White then locked the automobile.

White and Settler went to the Cold Duck and informed Drinan of their discovery. Drinan then told defendant he was

suspected of marihuana smuggling, and at Drinan's request, Settler again read defendant his *Miranda* rights. Defendant stated that he understood his rights, that he did not want a lawyer at that time, and that he would be willing to answer questions. The atmosphere at this time was relaxed and casual. Defendant freely moved around the boat and prepared a meal while talking with Drinan. Defendant showed Drinan his bill of sale for the boat (Government Exhibit #1) and denied that he and his boat had been engaged in any wrongdoing. Drinan explained defendant's probable sentence if he were convicted of drug smuggling. Drinan suggest that defendant could receive a lighter sentence if he cooperated with authorities, but defendant declined to do so. Drinan then told defendant that he, Drinan, was seizing the Cold Duck.⁴

Defendant, Drinan, and the County officers next left the boat and returned to the locked Blazer. Although defendant claimed he did not know who owned the vehicle, he did unlock the door and the trunk of the Blazer with his keys. In the trunk were four suitcases, which Drinan removed and placed on the ground. The first three suitcases were unlocked. With each of the unlocked suitcases, Drinan asked defendant if he owned it. When defendant replied in the negative, Drinan then asked if defendant knew who was the owner. When defendant again answered negatively, Drinan proceeded to search the suitcases, without any objection by defendant. The fourth piece of luggage (Government Exhibit #2) was locked with a combination lock. Defendant denied ownership of this bag as well, but agreed to work the combination and unlock it. In the fourth suitcase Drinan found a checkbook bearing the

⁴ Drinan admitted during his testimony that at the time the only basis upon which he could have seized the Cold Duck was the marihuana debris which he and the deputies had observed on board the boat. See *United States v. One Clipper Bow Ketch "NISKU,"* 548 F.2d 8 (1st Cir. 1977).

name of Jackie D. Miller, which defendant claimed belonged to his father, and a cube of what appeared to be hashish. Drinan field-tested the substance and found it to be hashish. He then seized the hashish, placed defendant under arrest for illegal possession of hashish, and seized the Blazer.⁵

Following the arrest, Settler frisked defendant and found a sales receipt (Government Exhibit #3) for an industrial vacuum cleaner purchased at Sears, Roebuck & Co. on May 13, 1977. A "John Davis," had signed the receipt as purchaser. Defendant at first denied knowing "John Davis," but later admitted that he had signed the receipt. After the arrest the Blazer was thoroughly searched and a key (Government Exhibit #5), which later proved to fit the lock of the main house at Mill Isle, was found. The party then left the Blazer and returned to the Cold Duck. Pursuant to a request by Drinan, D.E.A. Agent Wayne L. Steadman arrived at the Cold Duck about 2:00 p.m. Steadman told defendant he was under arrest and had defendant read with him a *Miranda* rights form (Government Exhibit #4). Although defendant refused to sign the form, he stated that he understood his rights. He neither asked for a lawyer nor demanded that all questioning cease. Steadman gave defendant receipts for his boat and car and took defendant's history. Defendant then was transported to a detention cell at the Sagadahoc County Sheriff's Office in Bath.

After defendant was taken to the detention cell, Drinan, Brawn and Settler drove to Woolwich to investigate the post office box address defendant had used. The officers obtained the street address from a postal employee. They found the house was empty and learned from neighbors that the occupant, "Jackie," had moved out several weeks before.

⁵ Under cross-examination Drinan conceded that he made it clear to defendant that the suitcases eventually would be opened with or without defendant's assistance.

2. *The First Mill Isle Visit*

On the way back from Woolwich, around 4:00 p.m., Deputy Brawn suggested that, because of the course line on the chart leading from the marina to Mill Isle, he, Drinan, and Settler should go to Mill Isle to see if any of the residents could add to information about the Cold Duck.⁶ Drinan had not seen the chart on the Cold Duck and this was the first time he had heard of Mill Isle.⁷ The officers decided to go to Mill Isle to question the occupants of the houses there to see if they had observed any unusual activity at the deep water dock located there.

Upon arriving at Mill Isle the officers drove toward the chalet to question the occupants. They parked between the chalet and the dock. A telescope protruding from a trash barrel on the dock immediately attracted their attention. As they walked toward and onto the dock they observed substantial amounts of marihuana debris spread over the boards of the dock and in the cracks between the boards. The debris later tested as marihuana. Fresh tire tracks in the road from the dock bore distinctive markings similar to the criss-cross tread of the oversize tires on the Blazer. At the chalet the curtains were drawn and no one responded to the agents' knocks. As

⁶ At some time during the morning or early afternoon hours of May 14, marina owner Becker had mentioned to Brawn his suspicions that the Cold Duck may have been associated with alleged drug smuggling activity at Mill Isle, which the D.E.A. had investigated in 1974. He also mentioned that a man named Wayland Purmont had been the subject of the investigation. Brawn testified that he paid little attention to Becker's comment, did nothing about it, and did not mention the conversation to Drinan.

⁷ Mill Isle is a peninsula of land connected to the mainland by a causeway. The parcel contains a dock, a chalet cottage near the dock, a main house one-quarter mile from the chalet, a barn close to the main house, and assorted outbuildings. The road across the causeway to the main house is a public road. All other roads on Mill Isle are private.

the officers prepared to go to the main house, Brawn suggested that they take a shortcut on a woods road leading from the chalet to the main house. On this road before they reached the main house the officers spotted a large tarpaulin, which covered a bulky object located at the side of the road. Scattered around it were baggie twists, of the sort used to tie large trash bags, and marihuana debris. The trail was beaten down and bore tire marks matching those near the dock. Drinan lifted the tarpaulin. Underneath was a burlap bag, weighing 40 lbs., measuring 2' x 2.5' x 1', with the number "43" stenciled in red on it. Drinan identified the object as a bale of marihuana. The contents later tested to be marihuana. Drinan placed the bale in the trunk of the car, and the agents left Mill Isle and returned to the Sheriff's office in Bath.

At Bath, Drinan showed the bale to defendant in his detention cell, stated that the "stakes" had gone up, and asked defendant if he wished to cooperate. Defendant again declined. Drinan then left the cell and joined Brawn at the Lincoln County Courthouse, where Brawn and an assistant district attorney prepared an affidavit for a search warrant for the premises at Mill Isle (Government Exhibit #10).⁸ Around 8:00 p.m. Judge Paul MacDonald of the Maine District Court issued the warrant (Government Exhibit #10) to Brawn.

3. *The Second Mill Isle Visit*

By 8:30 p.m. a search party consisting of Drinan, Brawn, Settler and several other deputies and state police officers assembled at Mill Isle. Drinan and Brawn led the search of

⁸ Brawn attached to the affidavit two photographs of Mill Isle (Government Exhibits #6 and #7) taken in conjunction with the 1974 Purmont investigation, which he had found in a file in his desk. The previous occupant of Brawn's desk at the Sheriff's office had left the file, and Brawn had not bothered to remove it.

the main house. Settler and others went to the chalet. They found that the chalet was stacked waist high with over 60 bales of marihuana. Testing later proved the substance to be marihuana. There also were warehouse rollers and stands and a new Sears industrial vacuum cleaner bearing the same model number as that on the receipt which defendant had had on his person. News of this find was conveyed to Drinan in the main house. Drinan telephoned defendant at the Bath Police Department jail, to which he had been moved, disclosed what the authorities had found, and again asked defendant if he wished to cooperate. Defendant again refused. Completing the inventory and related matters of the search lasted until 12:30 a.m., May 15. Brawn executed the return on the warrant (Government Exhibit #10) and filed it with the Clerk of the Maine District Court in Bath.

C. *Events of Sunday, May 15, 1977*

Drinan returned to defendant's cell at about 1:00 a.m. on Sunday, May 15. With Drinan and defendant in one car and Steadman following behind in a second vehicle, the party left Bath to transfer defendant to the Cumberland County jail in Portland pending his arraignment before the U.S. Magistrate. During the ride Drinan and defendant engaged in small talk. They and Steadman stopped for a snack at a diner before reaching Portland. Defendant had a tuna fish sandwich and a cup of hot chocolate. Shortly after they left the diner, defendant spontaneously asked Drinan where he had found the first bale. Drinan refused to answer, but remarked that defendant had made a big mistake in jeopardizing a million dollar deal by returning for a \$20,000 boat. Drinan next said that he did not think that law enforcement personnel had recovered all of the marihuana. Defendant replied, "Exactly. But you got a good piece of it, enough to destroy our profit." There was a

pause, and defendant then stated, "Funny thing was, this was our first run." Drinan expressed disbelief at this statement and inquired as to the source of the marihuana. Defendant said it was of good quality from Colombia. At about 10:30 a.m. defendant was checked into the Cumberland County jail.

D. *Events of Monday, May 16, 1977*

On Monday, May 16, defendant was arraigned, with his present counsel, before the United States Magistrate in Portland. This date was the first time that defendant sought the assistance of counsel. The arraignment proceedings were postponed until the afternoon in order to give defendant the opportunity to obtain counsel.

II

The Law

Defendant seeks to suppress all of the evidence taken from the Cold Duck, the Blazer, the suitcase, his person and Mill Isle prior to the issuance of the search warrant on the ground that such evidence was the product of warrantless searches and seizures which were not justified by a recognized exception to the Fourth Amendment warrant requirement. Defendant further argues that the evidence seized at Mill Isle pursuant to the search warrant must be suppressed because Brawn's affidavit failed to set forth sufficient probable cause to sustain its issuance, because the warrant was overbroad on its face, and because the warrant failed to comply with the terms of Fed.R.Crim.P. 41. Finally, defendant contends that his statements to Drinan in the early hours of Sunday, May 15, during their drive from Bath to Portland are inadmissible

under the doctrine of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and its progeny.

The evidence at issue on this motion may be classified as follows: (a) the marihuana debris, nautical chart, and bill of sale taken from the yacht Cold Duck, (b) the marihuana debris and the key taken from the Blazer, (c) the suitcase secured by a combination lock and the hashish found therein, (d) the receipt for the industrial vacuum cleaner found on defendant's person, (e) the bale of marihuana, the tarpaulin, the baggie twists, and the marihuana debris discovered at Mill Isle during the afternoon of Saturday, May 14, prior to the issuance of the search warrant, (f) the numerous bales of marihuana, the warehouse rollers and stands, the industrial vacuum cleaner, and the various other items seized at Mill Isle during the evening of Saturday, May 14, after the issuance of the search warrant, and (g) defendant's statements to Drinan in the early morning of Sunday, May 15. The Court will consider each category of evidence seriatim.

A. Items Taken From the Yacht Cold Duck

At the outset, the Court reiterates the fundamental tenets of the law of search and seizure, that warrantless searches or seizures are impermissible unless justified by recognized exigent circumstances and that the burden rests on the Government to prove that such circumstances had existed when it attempts to validate a warrantless search or seizure. *E.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Vale v. Louisiana*, 399 U.S. 30, 34, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970).

It is settled that an intrusion by law enforcement officials during the course of an emergency situation qualifies as an exigent circumstance for which a warrant is not required. *E.g.*, *United States v. Jeffers*, 342 U.S. 48, 52, 72 S.Ct. 93, 96 L.Ed.

59 (1951); *McDonald v. United States*, 335 U.S. 451, 454, 69 S.Ct. 191, 93 L.Ed. 153 (1948). That such an emergency existed on Friday, May 13, when Brawn and Coast Guard officers first boarded the Cold Duck is beyond dispute.⁹ A yacht unknown to personnel at the Robinhood Marina and with no one aboard was discovered fouled in one of the marina's moorings. It was entirely reasonable for law enforcement officials to fear that a drowning or other nautical mishap may have occurred, and it was equally reasonable for them to board the boat in order to investigate the purported accident. That Kinney and White were lawfully investigating the same emergency when they boarded the Cold Duck on the morning of May 14 and observed the marihuana debris and the navigational chart is clearly established by uncontradicted testimony.¹⁰ The evidence is also uncontroverted that the two did not engage in a general search of the vessel. The officers were lawfully aboard the vessel, and the items they observed were in plain view and discovered inadvertently. On these facts, the seizure of the debris and the chart fall within the "plain view" exception to the warrant requirement, the criteria for which were set forth by the Supreme Court in *Coolidge v. New Hampshire*, *supra* 403 U.S. at 464-73, 91 S. Ct. 2022. Defendant's motion to suppress these items is denied.

The bill of sale for the Cold Duck likewise is admissible. Defendant voluntarily accompanied Tainter and Brawn

⁹ Indeed, defendant so concedes in his Reply Memorandum in Support of his Motion For Return of Property and for Suppression of Evidence, at 2.

¹⁰ Defendant attempts to make much of Kinney's official designation as the deputy in charge of criminal investigation. Defendant claims that Kinney's presence at the marina transformed the investigation of the accident into a narcotic probe. As Kinney himself testified, however, due to the small size of the Sagadahoc County Sheriff's Department, he frequently was called upon to investigate a range of matters, both criminal and noncriminal. On the morning of May 14 Kinney was investigating a possible drowning.

aboard the boat, willingly furnished the bill of sale for Drinan's perusal, and had been read his *Miranda* rights twice prior to producing the bill of sale. Defendant suggests, however, that he may have acted under duress. Whether his action was in fact voluntary or was the product of duress or coercion is "a question of fact to be determined from the totality of all the circumstances," including the maturity of the accused, his educational background and intelligence, whether the accused was informed of his constitutional rights, the length of the accused's detention, and whether he was subject to physical punishment or other forms of coercion which overbore his will. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

No evidence was introduced that defendant was under duress when he produced the bill of sale. To the contrary, the atmosphere aboard the Cold Duck during the episode was relaxed and casual. Defendant is a mature, 25 year old high school graduate who had been fully informed of his rights prior to the seizure of the bill of sale. The undisputed evidence establishes that his actions were completely voluntary. Under well settled principles, the bill of sale is clearly admissible. *Schneckloth*, *supra* at 219, 93 S.Ct. 2041; *Davis v. United States*, 328 U.S. 582, 593-94, S.Ct. 1256, 90 L.Ed. 1453 (1946); *Zap v. United States*, 328 U.S. 624, 630, 66 S.Ct. 1277, 90 L.Ed. 1477 (1946). Defendant's motion to suppress the bill of sale is denied.

B. Items Taken From the Blazer

The two items found in the Blazer, the marihuana debris and the key, were taken without warrant but at different times and under different circumstances.

The marihuana debris was found in the vehicle after defendant had returned to the marina parking lot with White

but before Drinan placed defendant under arrest. Defendant had left open the door on the driver's side of the Blazer when he boarded the Cold Duck with Tainter and Brawn. While "admiring" the vehicle, White, Kinney and Settler spotted the debris on the front floor through the open door. The discovery of the debris was inadvertent and not the result of a search of the car. See *Harris v. United States*, 390 U.S. 234, 236, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968). No privacy expectation of the defendant was violated when the three deputies saw the debris through the open door and removed a sample from the Blazer. As the Supreme Court consistently has noted, an individual has a lesser expectation of privacy with respect to a motor vehicle than he enjoys with regard to his person, his home, or repositories of his personal effects. *E.g.*, *United States v. Chadwick*, 433 U.S. 1, 3, 97 S.Ct. 2476, 53 L.Ed.2d 538 (June 21, 1977); *Cardwell v. Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) (plurality opinion); *Chambers v. Marroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). Defendant further lessened this diminished privacy expectation by leaving the vehicle unlocked and the door open. The debris was in plain view to anyone standing in the parking lot near the open door. The deputies' presence in the parking lot was permissible, and the officers' discovery of the marihuana debris was inadvertent. The debris is admissible under the plain view doctrine. *Coolidge v. New Hampshire*, *supra* 403 U.S. at 464-73, 91 S.Ct. 2022; *Harris v. United States*, *supra*.

The key to the lock of the main house at Mill Isle was found in the Blazer after Drinan had arrested defendant for illegal possession of hashish and after he had seized the vehicle. The search of the vehicle was clearly proper as incident to the arrest. *Gorman v. United States*, 380 F.2d 158, 162 (1st Cir. 1967), and cases there cited. See also *Chambers v. Maroney*,

supra 399 U.S. at 46-52, 90 S.Ct. 1975. Moreover, as a D.E.A. agent, Drinan possessed statutory authority to take the Blazer into custody without a warrant because of its use in the transportation of controlled substances — the marihuana debris and the hashish which had been found therein. 21 U.S.C. §§ 878(4), 881(b)(1), (4); *United States v. One 1972 Chevrolet Nova*, 560 F.2d 464 (1st Cir. 1977). It has been consistently held that warrantless searches of vehicles appropriately taken into custody are reasonable under the Fourth Amendment. *South Dakota v. Opperman*, 428 U.S. 364, 367-76, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976); *Cooper v. California*, 386 U.S. 58, 61-62, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967). On either basis, the key is admissible in evidence.

Defendant's motion to suppress the marihuana debris and the key found in the Blazer is denied.

C. Combination-lock Suitcase and Hashish Therein

The admissibility of the locked suitcase and the hashish discovered therein pivots on whether defendant validly consented to Drinan's removal of the suitcase from the Blazer and his search of the contents. A locked piece of personal luggage carries with it a high expectation of privacy, and a warrantless intrusion into such a repository of personal effects must be justified by consent or some similar circumstance. *United States v. Chadwick*, *supra*, 433 U.S. at 11, 97 S.Ct. 2476.

The Court is satisfied that under the tests propounded in *Schneckloth v. Bustamonte*, *supra*, defendant's behavior in permitting Drinan to remove and examine the suitcase was wholly voluntary. Defendant willingly unlocked the Blazer in which the suitcase had been stored and worked the combination lock of the bag himself. He did so after twice being apprised of his *Miranda* rights. The fact that Drinan indicated to defendant that law enforcement officials eventually would open the suitcase with or without defendant's consent cannot

be viewed as interfering with defendant's free will in any way. Both before and after this incident, defendant demonstrated his capacity to exercise independent judgment through his decisions not to answer various questions and not to comply with certain requests of law enforcement officials. The suitcase and the hashish are properly admissible as the product of a valid consent search. *United States v. Watson*, 423 U.S. 411, 424-25, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976); *Schneckloth v. Bustamonte*, *supra*; *Davis v. United States*, *supra*; *Zap v. United States*, *supra*; *Gorman v. United States*, *supra* at 163-64, 165. Defendant's motion to suppress the suitcase and hashish is denied.

D. Receipt Taken From Defendant's Person

The search of defendant's person and the seizure of the receipt for the industrial vacuum cleaner found on his person are justified as incident to a lawful arrest. Drinan's arrest of defendant after discovery of the hashish plainly was legal. Drinan had sufficient probable cause to arrest defendant for illegal possession of hashish, and he obtained the evidence upon which probable cause was based through a valid consent search. The Supreme Court has thoroughly established the authority of law enforcement officers to search a person incident to a lawful arrest. *E.g.*, *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467 38 L.Ed.2d 427 (1973); *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Defendant's motion to suppress the receipt is denied.

E. Items Taken From Mill Isle Prior to the Issuance of the Search Warrant

The legality of the taking of the marihuana debris the tarpaulin, the baggie twists, and the marihuana bale from Mill

Isle prior to the issuance of the search warrant raises two questions. The first is whether Drinan, Brawn and Settler appropriately visited Mill Isle without a warrant and the second is, if so, whether the items they found were discovered as the result of an unlawful search and seizure.

The evidence presented at the hearing consistently demonstrates that the three officers first went to Mill Isle in order to question residents there about the Cold Duck. None of the testimony suggests that the officers intended to conduct a search of the premises or were operating under any other improper motive. It is firmly established that a police officer who in the performance of his duty enters upon private property to ask preliminary questions of the occupants thereof does not commit an illegal search. *E.g.*, *United States v. Hersh*, 464 F.2d 228, 229-30 (9th Cir. 1972); *United States v. Knight*, 451 F.2d 275, 278 (5th Cir. 1971), *cert. denied*, 405 U.S. 965, 92 S.Ct. 1171, 31 L.Ed.2d 240 (1972); *Davis v. United States*, 327 F.2d 301, 303 (9th Cir. 1964). Thus, the initial entry onto the Mill Isle peninsula was for legitimate purposes and did not constitute an illegal search.

Since the presence of the three officers at Mill Isle was legal, the objects which they found are admissible provided that the "plain view" standards of *Coolidge v. New Hampshire*, *supra*, are met. There is no question that the marihuana debris scattered between the boards on the dock falls within the ambit of the plain view doctrine. Drinan, Brawn and Settler had just parked their vehicle between the chalet cottage and the dock when the telescope in the trash barrel reasonably drew their attention to the dock. Their discovery of the marihuana debris, in plain view on the dock, was completely accidental and unplanned.

The discovery of the marihuana debris, the baggie twists, the tarpaulin and the marihuana bale on the unpaved road running between the chalet and the main dwelling was simi-

larly inadvertent. With the exception of the bale itself, all of these latter items were in plain view. As for the marihuana bale, the Supreme Court has consistently interpreted Fourth Amendment questions in the context of privacy-oriented standards. *E.g.*, *United States v. Chadwick*, *supra* 433 U.S. at 11, 97 S.Ct. 2476; *Katz v. United States*, 389 U.S. 347, 351-53, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Applying these standards, the Court is persuaded that defendant suffered no invasion of privacy when Drinan lifted the tarpaulin off the bale. Unlike the double-locked foot-locker involved in *United States v. Chadwick*, *supra*, a tarpaulin is not a repository of personal effects enjoying a high degree of protection against intrusion. Nor was the bale of marihuana found in a place, such as a private dwelling, usually free from intrusion by individuals other than the owner of the property. It was discovered lying by a woods road open for use by anyone passing from the dock to the main house.¹¹ Moreover, the bale was not secured from intrusion in any meaningful way. It was not locked in a trunk or stamped with labels warning unauthorized people to keep away but merely was draped with a tarpaulin. Clearly, the condition and location of the bale was such that defendant could not have had a justifiable expectation of privacy with respect to its discovery by persons lawfully passing along the woods road. *Cf. United States v. Hanahan*, 442 F.2d 649 (7th Cir. 1971).

The marihuana bale, as well as the tarpaulin, the baggie twists, and the marihuana debris found by the officers at Mill Isle on the afternoon of May 14 were reasonably seized and are admissible in evidence. Defendant's motion to suppress these items is denied.

¹¹ There is no evidence that "No Trespassing" signs were posted on the premises at Mill Isle.

F. *Items Taken From Mill Isle Pursuant to the Warrant.*

Defendant's objections to the admissibility of the items taken from Mill Isle during the evening of May 14 pursuant to the search warrant are threefold. None have merit.

(1) Defendant initially argues that the affidavit underlying the search warrant failed to set forth sufficient probable cause to sustain the issuance of a warrant authorizing a search of the buildings at Mill Isle. Specifically, defendant contends that Brawn's affidavit does not allege facts to link the marihuana bale found by the road with any of the buildings on the premises.

The courts have consistently compared the level of probable cause necessary to support a warrant with a reasonable belief standard and have not equated the existence of probable cause with proof beyond a reasonable doubt. *E.g.*, *Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949); *Vitali v. United States*, 383 F.2d 121, 122 (1st Cir. 1967); *Rosencranz v. United States*, 356 F.2d 310, 314 (1st Cir. 1966) (probable cause only means evidence sufficient "to persuade a man of reasonable caution to believe a crime is being committed"). Furthermore, the magistrate reviewing the application for the warrant "is entitled to draw reasonable inferences from the facts contained in the affidavit based on his experience in such matters." *Rosencranz v. United States*, *supra*; *United States v. Spearman*, 532 F.2d 132, 133 (9th Cir. 1976).

Based on the facts alleged in the affidavit, on the photographs appended to the affidavit showing the relationship of the road where the marihuana bale was found to the two dwellings, and on the reasonable inference which the magistrate was entitled to draw that a smuggler would attempt both to protect contraband from the elements and to hide it from police authorities by placing it in a building, the affidavit

clearly sets forth adequate probable cause to authorize issuance of the warrant to search the main house, the chalet, the barn and the outbuildings at Mill Isle. As the Supreme Court stated in *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965):

If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

(2) Defendant also contends that the warrant was invalid because it was overbroad on its face. Defendant relies principally on *United States v. Votteller*, 544 F.2d 1355 (6th Cir. 1976), for the proposition that the warrant was too broad since it did not "particularly describe" the buildings at Mill Isle to be searched and the probable cause for searching each structure. The *Votteller* opinion, however, is inapposite and clearly distinguishable on its facts from the present case. The defective warrant in *Votteller* pertained to a multi-use, three-story building with apartments in the basement and on the second and third floors. The affidavit linked possible criminal activity only to the bar on the first floor. The Court held the warrant invalid for failure to particularize the place to be searched.

The question of sufficient particularity turns on whether the objects or buildings to be searched are described with the degree of clarity necessary so that the investigating officer will not search buildings, objects, persons or dwellings other than those for which probable cause sustaining the search exists and other than those which the magistrate contemplated when he issued the warrant. The purpose of the particularity requirement is to curb a general search unsupported by probable cause. *E.g.*, *Berger v. New York*, 388 U.S. 41, 55-60, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967); *Stanford v. Texas*, 379 U.S. 476, 480-86, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965). In the instant case, the warrant authorized a search of the buildings on Mill Isle as described in Brawn's affidavit: the main dwelling, the barn, the chalet and several small outbuildings. Because of the geographical isolation of Mill Isle, the common knowledge that it was a single parcel of real estate, the proximity of the buildings to be searched, the spatial relationship of the marihuana bale and the debris found during the first visit to those buildings, and the description of the buildings contained in Brawn's affidavit and shown in the accompanying photographs, it cannot be doubted that the warrant described with sufficient precision the objects of the search. *Cf. Houser v. Geary*, 465 F.2d 193, 196 (9th Cir. 1972), *cert. denied*, 409 U.S. 1113, 93 S.Ct. 927, 34 L.Ed.2d 696 (1973); *United States v. Hassell*, 427 F.2d 348, 349 (6th Cir. 1970).¹²

¹² Defendant appears also to contend that the warrant was defective because it failed to specify the exact quantity of marihuana to be sought. This argument borders on the frivolous. As the court stated in *United States v. Scharfman*, 448 F.2d 1352, 1354 (2d Cir. 1971), "The Fourth Amendment requirements do not impose a burden on the executing officer 'beyond his power to meet'." A requirement that the exact amount of contraband being sought be specified in a warrant would impose an impossible burden on the officers. Such a result is clearly not contemplated by the Fourth Amendment. See *United States v. Scharfman*, *supra*; *United States v. Fuller*, 441 F.2d 755 (4th Cir.), *cert. denied*, 404 U.S. 830, 92 S.Ct. 73, 30 L.Ed.2d 59 (1971).

(3) Defendant's final challenge to the warrant stems from the dual State-federal nature of the investigation. The warrant was issued as a State warrant by a State court judge to a State law enforcement officer on State grounds and was returned by a State officer to a State court, all in accordance with State rules. See Me.R.Crim.P. 41. It is undisputed, however, that the warrant aided a federal investigation, that federal law enforcement officers actively participated both in obtaining the warrant and in its execution, that no State prosecution has resulted, and that the evidence seized pursuant to the warrant is being employed in a federal prosecution. The search was therefore a "federal search," see *Lustig v. United States*, 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949); *Byars v. United States*, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927), and the Court will assume for purposes of the present decision that, as defendant contends, the warrant was governed by the federal standards embodied in Fed.R.Crim.P. 41. See *United States v. Burke*, 517 F.2d 377, 381-87 (2d Cir. 1975); *United States v. Sellers*, 483 F.2d 37, 41-44 (5th Cir. 1973), *cert. denied*, 417 U.S. 908, 94 S.Ct. 2604, 41 L.Ed.2d 212 (1974); *United States v. Haywood*, 150 U.S. App.D.C. 247, 251, 464 F.2d 765, 760 (1972); *Navarro v. United States (I)*, 400 F.2d 315 (5th Cir. 1968).

Defendant correctly notes that the search warrant did not comply with the requirements of Rule 41(c) in three respects: 1) the warrant was not addressed to a federal officer; 2) the warrant did not specify the time (not to exceed ten days) within which the search was to be completed; 3) the warrant failed to require that it be returned to a federal magistrate. Defendant argues that the failure of the warrant to comply with the requirements of Rule 41(c) in these respects renders inadmissible the evidence seized pursuant to the warrant.¹³ Defendant

¹³ Defendant also argues that the evidence obtained under the warrant cannot be used in a federal prosecution because the affidavit did not allege

does not contend, however, that the violations of Rule 41(c) are of constitutional magnitude, and when a warrant in a joint State-federal search has been issued under valid authority,¹⁴ the courts have refused to exclude evidence obtained under the warrant, despite technical noncompliance with Rule 41(c). *United States v. Burke, supra*; *United States v. Sellers, supra*.

The argument here made by defendant was raised and rejected by the court in *United States v. Burke, supra*. *Burke* involved a State warrant issued by a State court judge in aid of a federal investigation. The warrant failed to conform to the requirements of Rule 41(c) in precisely the same three respects as the warrant in the instant case. Although the court found that the three provisions which had been violated reflected "'a Rule-embodied policy designed to protect the integrity of the federal courts or to govern the conduct of federal officers'" (emphasis in original), *id.* at 385, the court held that the defects in the warrant were not of sufficient consequence to justify exclusion of the evidence. The court noted that, despite the technical defects in the warrant, a federal officer in fact assisted in its execution, the search was made on the same day

probable cause to believe that a federal crime had been committed. This argument was specifically rejected by the court in *United States v. Sellers, supra*, which emphasized that federal and State officers acting jointly "should be free to make a considered choice based on the best available information and unencumbered by merely technical procedural rules." *Id.* at 44.

¹⁴ Defendant cites *Navarro v. United States (I), supra*, and *United States v. Haywood, supra*, for the proposition that violation of Rule 41 triggers the exclusionary rule. *Navarro* held that the failure of law enforcement officers to obtain a warrant from "a judge of a state court of record," as required by Rule 41(a), required exclusion of the evidence obtained pursuant to the warrant. See also *United States v. Haywood, supra* (dictum). As Judge Friendly observed in *Burke*, however, "the defect [in *Navarro*] was basic; since the issuing judge was not of 'a state court of record', there was in effect no warrant at all for federal purposes." *Id.* at 385. In the present case, it is uncontested that the warrant was issued by a judge of a court of record of the State of Maine.

as the warrant was issued, and the return was made on the following day to the issuing court by the State officer. Judge Friendly, writing for the court, concluded that, except in a case like *Navarro*, where the violation was found to be of constitutional dimensions, "violations of Rule 41 alone should not lead to exclusion unless (1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule." *Id.* at 386-87 (footnotes omitted). See also *United States v. Sellers, supra*.

The facts in the instant case precisely parallel those of *Burke*. The Rule 41 violations are plainly not of constitutional magnitude, and this Court agrees with *Burke* that they were not of sufficient consequence to justify the use of the exclusionary rule. Defendant has introduced no evidence to suggest that the failure to comply with the requirements of Rule 41(c) prejudiced him in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed. Nor is there any evidence of an intentional and deliberate disregard of a provision in the Rule. The Court concludes that the warrant was valid despite the technical violations of Rule 41(c).

Defendant's motion to suppress the bales of marihuana, the warehouse rollers and stands, the industrial vacuum cleaner and the other evidence seized at Mill Isle during the evening of Saturday, May 14, pursuant to the search warrant is denied.

G. Defendant's Statements to Drinan on Sunday, May 15

The admissibility of defendant's inculpatory statements to Drinan in the early morning hours of Sunday, May 15, during the trip from Bath to Portland, depends wholly on the voluntariness of defendant's waiver of his right to remain silent.

Miranda v. Arizona, *supra* 384 U.S. at 444-45, 86 S.Ct. 1602. At no time during the events of Saturday, May 14, or in the course of the ride from Bath to Portland early the next morning did defendant ask that he be allowed to consult with counsel or request that all interrogation of him cease. The evidence produced at the hearing revealed that defendant willingly made the statements to Drinan and that he had not been subject to coercion or duress of any sort. Law enforcement officials treated defendant in an exemplary manner throughout. Defendant had not been threatened or physically abused. He was not suffering from prolonged lack of sleep when he spoke with Drinan, and he had eaten a light meal which Steadman had bought him just prior to talking to Drinan. Tellingly, it was defendant, not Drinan, who initiated the conversation.

Prior to defendant's departing Bath with Drinan, law enforcement officers on three separate occasions had informed defendant of his *Miranda* rights. Neither the fact that defendant was last read his rights several hours prior to the drive to Portland nor the fact that defendant refused to sign a written waiver of his rights taint the voluntariness of defendant's waiver. *United States v. Rogers*, 504 F.2d 1079 (5th Cir. 1974); *United States v. Osterburg*, 423 F.2d 704, 705 (9th Cir.), *cert. denied*, 399 U.S. 914, 90 S.Ct. 2166, 26 L.Ed.2d 571 (1970); *United States v. Speaks*, 453 F.2d 966, 968-69 (1st Cir.), *cert. denied*, 405 U.S. 1071, 92 S.Ct. 1522, 31 L.Ed.2d 804 (1972); *United States v. Van Dusen*, 431 F.2d 1278 (1st Cir. 1970). Defendant's waiver of his right to remain silent was a knowing, intelligent and voluntary decision. The statements he made to Drinan are admissible. Defendant's motion to suppress the statements is denied.

Defendant's motion for return of property and for suppression of evidence is in all respects denied.

IT IS SO ORDERED.

United States Court of Appeals for the First Circuit

No. 78-1093

UNITED STATES OF AMERICA,
APPELLEE,

v.

JACKIE DAVID MILLER,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. Edward T. Gignoux, U.S. District Judge]

Before Coffin, *Chief Judge*, Kunzig,* *Judge*, U.S. Court of
Claims, Dumbauld,** *Senior District Judge*.

Martin G. Weinberg, with whom Joseph S. Oteri, Judith F. Bowman,
Oteri & Weinberg, Jeanne Baker, David J. Fine, and Rosenberg, Baker &
Fine, were on brief, for appellant.

George J. Mitchell, United States Attorney, with whom Paula D. Silsby,
Assistant United States Attorney, was on brief, for appellee.

November 15, 1978

COFFIN, *Chief Judge*. A jury found appellant guilty of im-
porting and possessing with intent to distribute more than

*Sitting by designation.

**Of the Western District of Pennsylvania, sitting by designation.

3000 pounds of marijuana. 21 U.S.C. §§ 841(a)(1), 952(a), 960(a)(1); 18 U.S.C. § 2. The jury also convicted him of possession of 2 grams of hashish. 21 U.S.C. § 844(a). The district judge sentenced appellant to the maximum term in prison for each of the three offenses, 5 years for each of the first two offenses and one year for the third, the sentences to run concurrently. Appellant now challenges some aspect of virtually every stage of official interference with his enterprise: the searches of his boat, car, and land; the use at trial of his admissions of guilt; the admission of evidence of the size of his enterprise; the sufficiency of the evidence supporting his conviction for importation; the charge to the jury explaining reasonable doubt; and the considerations supporting the trial court's imposition of maximum sentences. The relevant facts add up to a substantial narrative. Each cluster of facts provides one or more occasions for an exercise of judgment by one or more of several law enforcement agencies. All such decisions are attacked on appeal. Some issues were not preserved; some are close questions. We conclude our necessarily lengthy analysis by affirming.

THE FACTS

We set forth in this preliminary statement the events necessary to put each of appellant's arguments in context. Elaboration essential for the disposition of particular issues appears subsequently.

On Friday, May 13, 1977, at approximately 5:45 a.m., an employee of the Robinhood Marina in Arrowsic, Maine, noticed a yacht, the COLD DUCK, fouled in one of the marina's moorings about 250 yards offshore. The boat had never been seen in Arrowsic before and no one had arranged to rent the mooring. By mid-afternoon employees of the marina decided

to investigate. One employee rowed out and boarded the boat. He found no one on board, the rubber dinghy, used to ferry mariners ashore, still in the cockpit, and a partially eaten meal on the stove. Meanwhile, another employee called the boat's home port and learned that the boat had recently been sold to one Jackie Miller. After conferring, the employees called the Coast Guard to report a suspected drowning.

The Coast Guard visited the marina and notified the Sagadahoc County Sheriff's Office. By 8:00 p.m. the Coast Guard, Maine State Police, Sheriff's Office, Maine State Department of Sea and Shore Fisheries and the owner of the marina had all arrived to investigate. At approximately 10:30 p.m. Chief Deputy Sheriff Charles Brawn and Coast Guard officers boarded the COLD DUCK. They found a bill of sale and registration made out to Jackie D. Miller, P. O. Box 42, Woolwich, Maine. They left the boat. The Coast Guard then called the former owner of the boat and learned that Miller had paid \$19,500 cash in small bills for the boat and had asked for a receipt showing a price of \$15,000.

The Sheriff's Office assumed responsibility for hiring divers to search the area for bodies at first light, and all officials left the area around midnight. Deputy Frederick White was assigned to make an hourly visual check on the boat during the night. Shortly after midnight, Deputy Brawn tried to telephone Drug Enforcement Agency (DEA) Special Agent Edward Drinan, who heads DEA operations in Maine. Brawn suspected the COLD DUCK might be involved in drug smuggling operations being investigated in Lincoln County. Independent of Deputy Brawn, a Coast Guard warrant officer who had attended "drug awareness" seminars conducted by Drinan succeeded in reaching the agent and informed him about the COLD DUCK.

At 9:00 a.m. Deputy White and Deputy Gordon Kinney met at the marina. Divers were already searching the waters

around the boat. Kinney and White boarded the COLD DUCK to help the Coast Guard in clearing the boat from its fouled mooring lines and towing it to a marina slip. While aboard, the deputies noticed several thousand dollars worth of new electronic navigational equipment which had been installed in a sloppy, unprofessional manner. They also noticed a number of roaches (partially burned marijuana cigarettes) in ashtrays on the deck and the flying bridge. Perusing the main cabin for more information about where the owner might have gone, Kinney noticed a navigational chart lying on the floor, folded so that the printed part of the chart was exposed. He spread the chart on the table and observed a penciled course threading its way from the marina to a ledge located off of Mill Isle, a secluded peninsula located in Arrowsic near the confluence of the Sasanoa and Back rivers. White and Kinney did not engage in a general search of the boat.

When the boat was secured to the dock, Deputy Brawn boarded it to discuss the situation with White and Kinney. They showed him the chart and the three discussed the possibility that the boat was involved in drug smuggling in the area. At about the same time, appellant drove into the marina parking lot in a late model, black Chevrolet Blazer. Appellant approached Willard Muise, a marina employee working in the lot, identified himself, and stated that he wished to lease a mooring for his boat. When Muise asked what type of boat Miller owned, appellant pointed to the COLD DUCK and noticed law enforcement officers on her. Appellant inquired about their presence and Muise explained that the men had brought the boat to the dock in order to free the mooring. Muise then suggested that appellant check with the main office about renting a mooring and left the lot.

A few minutes later Muise went down to the COLD DUCK and asked if appellant had been there. He had not. Muise provided a description of appellant and his vehicle, and wit-

nesses in the lot reported that he had recently departed, apparently in a hurry. The three deputies set out in two cars to locate appellant. Deputy White proceeded alone to Georgetown Center where he passed appellant going in the opposite direction. The two had eye contact and appellant accelerated rapidly.¹ White immediately turned and gave chase, at speeds in excess of 90 miles per hour. White caught up with appellant in about two miles and, with lights and siren operating, tailed appellant for another two miles before appellant stopped his vehicle. Appellant produced his license and registration upon request and admitted that he owned the COLD DUCK. White then escorted appellant back to the marina, driving his police car behind the Blazer.

At the marina parking lot, Brawn began to question appellant, and, after appellant again admitted owning the COLD DUCK, Brawn read him his *Miranda* rights. Appellant agreed to speak without a lawyer. Appellant then stated that his ownership papers were on the boat and voluntarily accompanied Brawn and Sheriff Tainter in boarding her. Agent Drinan arrived a few minutes later and, after being briefed by Brawn, boarded the COLD DUCK. Drinan identified himself to appellant and explained that he suspected appellant had been engaged in drug smuggling. He observed two roaches in an ashtray on the boat and proceeded to discuss the situation with appellant.

Meanwhile, back in the parking lot, Deputies White, Kinney, and Setlar were standing around "admiring" appellant's Blazer through the door that appellant had left open. They noticed marijuana debris on the floor of the vehicle, field

¹ As further detail may be relevant, we note that although the Deputy's vehicle was unmarked, it did possess a flashing light, Deputy White was in uniform, and appellant, sitting high in the Blazer, could look down and into the Deputy's car.

tested the substance, locked the vehicle, and apprised Drinan of their discovery. Drinan informed appellant that his suspicions were growing, and appellant was again informed of his *Miranda* rights. Appellant remained relaxed and casual, moving freely about the boat preparing a meal, answering general questions and refusing to answer when he so willed. Drinan suggested that appellant cooperate and explained maximum sentences for the crimes appellant might have committed. Appellant remained calm and denied any involvement with smuggling. Drinan then seized the COLD DUCK.

The parties then returned to the locked Blazer in the lot. Although appellant claimed he did not know who owned the vehicle, he unlocked it with his keys. Drinan removed four suitcases from the vehicle. When Drinan asked about the luggage, appellant disclaimed any ownership or knowledge of the suitcases. Drinan then searched the luggage, without any objection from appellant. The fourth piece was locked with a combination lock. Although appellant denied ownership of the suitcase, he stated that he knew the combination and unlocked it. In the case was a cube that a field test proved to be two grams of hashish. Drinan placed appellant under arrest for possession and seized the drug and the Blazer.

Deputy Setlar then frisked the appellant and found a sales receipt for an industrial vacuum cleaner, sold on May 13 (the day before) to a John Davis. Appellant later admitted he had signed the receipt using the false name. The Blazer was then thoroughly searched and a key, which later proved to fit the lock of the main house at Mill Isle, was found. Officers then went over a *Miranda* rights form with appellant, who stated that he understood his rights but would not sign the form. Appellant was then transported to a holding cell at the Sagadahoc County Sheriff's Office in Bath.

Drinan, Brawn, and Setlar then drove to Woolwich and, having obtained the street address that corresponded with ap-

pellant's post office box, found an empty house and neighbors who reported that "Jackie" had moved out several weeks before. Brawn then suggested that, based upon the course marked on the chart, appellant might be connected with Mill Isle. The officers decided to go to Mill Isle² to question the occupants of the houses there to see if they had observed any unusual activity at the deep water dock located there.

Upon arriving at Mill Isle the officers drove toward the chalet to question the occupants. They parked between the chalet and the dock. A telescope protruding from a trash barrel on the dock immediately attracted their attention. As they walked toward and onto the dock they observed substantial amounts of marijuana debris spread over the boards of the dock and in the cracks between the boards. The debris later tested as marijuana. Fresh tire tracks in the road from the dock bore distinctive markings similar to the criss-cross tread of the oversize tires on the Blazer. At the chalet the curtains were drawn and no one responded to the officers' knocks. As they prepared to go to the main house, Brawn suggested that they take a shortcut on a woods road leading from the chalet to the main house. On this road before they reached the main house the officers spotted a large tarpaulin, which covered a bulky object located at the side of the road. Scattered around it were baggie twists, of the sort used to tie large trash bags, and marijuana debris. The trail was beaten down and bore tire marks matching those near the dock. Drinan lifted the tarpaulin and found a forty pound bale of marijuana. Drinan seized the bale.

²Mill Isle is a peninsula of land connected to the mainland by a causeway. The parcel contains a dock, a chalet cottage near the dock, a main house one-quarter mile from the chalet, a barn close to the main house, and assorted outbuildings. The road across the causeway to the main house is a public road. All other roads on Mill Isle are private.

The officers then returned to Bath. Drinan again questioned appellant, telling him that the "stakes had gone up". Appellant declined to cooperate. Drinan then obtained and, with the help of local officers, executed a warrant to search the buildings on Mill Isle. In the chalet the officers found 60 bales of marijuana, a set of warehouse rollers and stands, and a new industrial vacuum cleaner matching the one bought by appellant the day before.

Drinan telephoned appellant from Mill Isle, explaining what had been found, and again asked appellant's cooperation. Appellant declined. After completing the search, Drinan returned to Bath to transport appellant to Portland for arraignment. On the way, the two stopped and had a light meal. Shortly after they left the diner, appellant spontaneously asked Drinan where he had found the first bale. Drinan refused to answer, but remarked that defendant had made a big mistake in jeopardizing a million dollar deal by returning for a \$20,000 boat. Drinan next said that he did not think that law enforcement personnel had recovered all of the marijuana. Defendant replied, "Exactly. But you got a good piece of it, enough to destroy our profit." There was a pause, and defendant then stated, "Funny thing was, this was our first run." Drinan expressed disbelief at this statement and inquired as to the source of the marijuana. Defendant said it was of good quality from Colombia.

Subsequent investigation revealed that appellant had leased the Mill Isle property for \$26,000, signing the lease on behalf of a fictitious organization named Carlisle Estate Ventures Ltd. Appellant, again in the name of Carlisle, had paid \$15,000 to exercise an option to purchase the property for \$260,000. Within two weeks prior to his arrest appellant had purchased a 48 foot ocean-going vessel named the HARVARD for \$17,400. A bill of sale for the HARVARD was found in the main house at Mill Isle. Appellant was a 25 year old unem-

ployed high school graduate with no ascertainable capital resources.

SEARCH AND SEIZURE ISSUES

We begin our discussion of Fourth Amendment issues with the fundamental premise that warrantless intrusions violating reasonable expectations of personal security and privacy are *per se* unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967). Several of the searches involved in this case raise questions about the definition of "reasonable expectations of privacy". Others are defended as being within the few exceptions to the protection provided to reasonable expectations of privacy, which exceptions are "jealously and carefully drawn". *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). Some of these searches give us no pause; others merit close analysis.

A. The Navigational Chart

Appellant first challenges the boardings and examinations of his boat, the COLD DUCK, that led to the seizure of a navigational chart. We have no difficulty approving the first boarding on the evening of May 13. At that point, a boat of unknown origin had been abandoned at a mooring belonging to another person, where it remained for over twelve hours, fouled in its lines. A boat, like an automobile, carries with it a lesser expectation of privacy than a home or an office. *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925).³ A boat, even more than an automobile,

³By so saying, we do not intend to imply that all of the doctrinal gloss applicable to automobiles is also applicable to boats. Nor do we purport to

becomes a matter of legitimate concern to public safety officials when it is found abandoned, 250 yards from shore, its dinghy still on board. The responsibility of state officials for the safety of property was triggered by these circumstances. See *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (state officials' "community caretaking functions" for vehicles involved in accidents). More important, the circumstances justified a reasonable fear of injury to life and limb, specifically a drowning. Such a combination of "community caretaking functions" and possibly exigent circumstances amply justified intruding upon the limited privacy expectations surrounding an abandoned vessel in order to determine ownership of the boat and the safety of its mariners. Cf. *Michigan v. Tyler*, ___ U.S. ___, 46 U.S.L.W. 4533 (May 31, 1978) (exigent circumstances allow warrantless intrusion to perform administrative function).

The following morning, Deputies White and Kinney boarded the COLD DUCK for what developed into a more extensive search. Because the officers had a duty to deal with abandoned property, see *Cady v. Dombrowski*, *supra*, the boarding itself was justified by the need to clear the vessel of its fouled moorings and secure it to a nearby dock, as the owner of the mooring desired. The search that took place during and

deal with such specialized craft as houseboats or vessels obviously used as homes. But it has long been recognized that boats, like automobiles, are subject to frequent limited intrusions by regulatory and safety officials. Such limited intrusions as warrantless safety and document checks of vessels are undoubtedly constitutional, *United States v. Warren*, (No. 75-4368, 5th Cir. 1978) (slip op. 6596) (en banc); and the mobility of an ocean vessel in many ways exceeds that of a car, justifying warrantless intrusion without probable cause for customs inspection far from the technical borders of the United States. *United States v. Ingham*, 502 F. 2d 1287 (5th Cir. 1974), *cert. denied*, 421 U.S. 911 (1975). Given such characteristics, the privacy expectations of a boat owner are necessarily limited. See *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

after the securing of the vessel, however, presents a more substantial question.⁴ It was this search that yielded the chart that led the officers to Mill Isle and the marijuana. Hours before this search, both the sheriff's department and the Coast Guard had each called in the DEA. The deputies noticed marijuana cigarettes and poorly installed electronic equipment soon after boarding the boat. We find it hard to believe that they did not smell a smuggler soon after, if not before, they boarded the boat. If these facts, and no others, were presented to us, we would be hard pressed to approve the seizure and use of the chart. The Fourth Amendment does not countenance warrantless "exploratory rummaging" on every unattended vessel that smells of smuggling. See *Coolidge v. New Hampshire*, *supra*, 403 U.S. at 467.

We are not, however, faced with a clear case of exploratory rummaging. Rather, three factors enable us to say that the search by White and Kinney was constitutional, despite the lack of a warrant. First, the district court found as a fact that a legitimate non-criminal purpose, investigation of a drowning, motivated White and Kinney's search. Second, the court found that the search was limited in scope to that purpose. Appellant argues that we must reject these findings as clearly erroneous, in the main because the sheriff's department had an address for the owner of the boat. We cannot agree that where there is an emergency need to obtain information in a non-criminal investigation the authorities are limited to pursuing one clue.⁵ Moreover, divers in the employ of the sheriff's

⁴Appellant argues at length that the trial court was clearly erroneous in finding that the deputies seized the chart before the boat was towed in. The record is admittedly unclear as to when the chart was found, but in view of our decision concerning the legality of the search as a whole, we find it unnecessary to decide exactly when the chart was discovered.

⁵Indeed, had the authorities restricted their search to investigating the Woolwich post office box address, they would have found themselves with

department were searching for bodies in the waters around the COLD DUCK at the same time that White and Kinney conducted their search. Such is clear evidence that a drowning investigation was being conducted.

The third factor is the Court's teaching in *Michigan v. Tyler*, *supra*. In *Tyler*, the Supreme Court sanctioned the initial warrantless, non-criminal search for evidence of the cause of a fire. Just as fire officials have a duty to seek the cause of a fire, the deputies in this case had a duty to seek the explanation for, and possible victims of, an apparent nautical mishap. In *Tyler*, such a search was permissible without a warrant for so long as the possible rekindling of the fire created an exigent situation. The circumstances of this case were equally, if not more exigent. Even more than the possible resurgence of the fire in *Tyler*, the tides of Maine made it likely that the object of the search, a body, would disappear if the search were delayed. Moreover, if exigent circumstances justify warrantless entry and seizure of evidence of arson, which evidence is inevitably criminal, then an emergency certainly justifies entry and seizure of a navigational chart, relevant to a possible drowning, which by happenstance later proves to be incriminating.⁶ Cf. *United States v. Warren*, (No. 75-4368, 5th Cir. 1978) (slip op. at 6596) (en banc) (permissible for Coast Guard inspection boarding to develop into criminal search).

an empty house, no further information on the apparently lost mariners, and several hours lost.

⁶Nothing in *Mincey v. Arizona*, ___ U.S. ___, 46 U.S.L.W. 4737 (No. 77-5353, June 21, 1978) is to the contrary. *Mincey* dealt with a proffered "homicide scene" exception to the warrant requirement where there was no possibility that injured victims still needed aid and where all victims of the incident had been located. *Mincey* expressly distinguished the situation in the instant case. Finally, *Mincey* dealt with a four-day, minute search of a dwelling; we deal with a brief examination of a vessel constantly subjected to official contact.

To summarize, appellant's limited expectations of privacy in the COLD DUCK, already minimized by its abandonment at an unauthorized mooring, were not violated by entry pursuant to a reasonable belief that an emergency required an immediate search. The owner of the vessel had been missing long enough to trigger a reasonable belief of danger to life and limb and not so long as to make the proffered emergency a mere pretext. The resulting search was "strictly circumscribed by the exigencies that justif[ied] its initiation." *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968). The chart was in plain view on the floor of the cabin. Its discovery was inadvertent. Opening it up was not exploratory rummaging, but rather went directly to the purpose of the officers' presence. See *Marron v. United States*, 275 U.S. 192 (1927). As in *Michigan v. Tyler*, it was self-evidently relevant to the non-criminal purpose of the investigation (finding the mariners) and therefore need not be self-evidently incriminating in order to fit squarely within the plain view exception articulated in *Coolidge v. New Hampshire*, *supra*.

B. Detention of Appellant for Questioning

As noted above, Deputy White apprehended appellant after a high speed chase beginning in Georgetown Center and ending some four miles later. Appellant now claims that when he drove his Blazer back to the marina, with Deputy White escorting from behind, he was already subject to arrest and that the arrest was made without probable cause. Appellant also argues that the events at the marina, which led to appellant's formal arrest, are tainted as the fruit of an illegal arrest.

As a preliminary matter, we lack, perhaps understandably, a full analysis below of the facts and law pertaining to the ini-

tial detention of appellant.⁷ We note that appellant did preserve the issue in his suppression argument. At oral argument on the suppression motion, the government took the position that the precise nature of the initial detention (investigative stop or full arrest) was irrelevant since Deputy White had probable cause for arrest. At oral argument on appeal the government refused to concede that Deputy White needed probable cause for arrest to justify the detention under the Fourth Amendment, but failed to offer us an alternative standard for evaluating what was clearly more than a brief investigatory stop under *Terry v. Ohio*, 392 U.S. 1 (1968).

We therefore rely on the record and the few facts found concerning the initial stop. The record reveals that after stopping appellant, Deputy White asked for and received his license and registration. After appellant, in response to questioning, identified himself as the owner of the COLD DUCK, Deputy White asked him to return to the marina for questioning. There is no evidence that appellant objected. Nevertheless, the deputy retained appellant's license and registration during the drive back to the marina. This testimony was uncontradicted.⁸

Given this testimony, the trial court stated in its finding of facts that the appellant "agreed" to accompany the deputy back to the marina. Because appellant was most cooperative with the authorities in the ensuing discussions at the dock, we could easily credit this finding of consent, had the deputy not retained the license and registration. Appellant could not

⁷ Given the number of challenges made by the appellant and the limited argument addressed to the original stop, we are not surprised by and cannot fault this single omission.

⁸ The record does not support the government's contention at oral argument that appellant may have consented prior to seizure of his license and registration. Deputy White's testimony on the sequence of events is to the contrary.

lawfully operate his vehicle without those papers. He was not free to go. Although the line between an investigatory stop and an arrest has yet to be fully defined (see, e.g., *United States v. Worthington*, 544 F. 2d 1275, 1281-88 (5th Cir. 1977) (Goldberg, J., dissenting)), when appellant was so significantly deprived of his liberty of movement for a substantial time, this was, if not an arrest, closer along the detention spectrum to an arrest than to an investigatory stop. See *Davis v. Mississippi*, 394 U.S. 721 (1969); *United States v. McCaleb*, 552 F. 2d 717, 720 (6th Cir. 1977); *United States v. McDevitt*, 508 F. 2d 8, 11 (10th Cir. 1974); *United States v. Maslanka*, 501 F. 2d 208, 213 n. 10 (5th Cir. 1974), *cert. denied sub nom. Knight v. United States*, 421 U.S. 912 (1975). Such investigatory detention requires more justification than the founded suspicion underlying a brief stop. *Davis v. Mississippi*, *supra*, 394 U.S. at 726-27; see *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). In the absence of any argument that an intermediate procedure falling between a stop and an arrest was either intended or authorized here, we must reject the government's position that probable cause for arrest was not required to justify the detention.

The government also argues that Deputy White had probable cause to arrest appellant for either of two crimes, speeding and unlawfully furnishing a scheduled drug. Although Maine statutes provide the usual plethora of regulations relating to the operation of motor vehicles, 29 M.R.S.A. § 1252(4) (West 1978) does not make speeding criminal until the operator exceeds the statutory limit by thirty miles per hour or more. As we have noted, appellant accelerated rapidly as soon as he saw Deputy White driving in the opposite direction in Georgetown Center. The speed limit at that point was 35 miles per hour. Deputy White immediately turned around and gave chase. The trial court found that the deputy travelled two miles at 90 miles per hour in order to

catch up with appellant and then paced appellant at 70 miles per hour for another two miles. The unposted statutory speed was 45 miles per hour. Thus, appellant argues that on the face of the record, Deputy White lacked 5 miles per hour to justify a speeding arrest.

We think the matter is not so simple. The statute authorizing warrantless arrests in these circumstances, 15 M.R.S.A. § 70 (West 1965 & Supp. 1978), directs a deputy to "arrest and detain persons found violating any law of the State" The word "found" has been interpreted to require that the offense be committed in the presence of the officer. *United States v. O'Donnell*, 209 F. Supp. 332 (D. Me. 1962). In *State v. Cowperthwaite*, 354 A. 2d 173 (Me. 1976), the Maine Supreme Judicial Court has interpreted the presence requirement as allowing arrest where the facts confronting an officer give him probable cause to believe that the offense is being committed. An officer may draw reasonable inferences from the immediate observations of his senses. *Id.* Applying this rule to the facts in this case, we find that Deputy White was statutorily and constitutionally authorized to arrest the appellant for speeding. Although the deputy never clocked the appellant at speeds 30 miles per hour in excess of the statutory limit, the deputy did know how much head start the appellant had and did know that speeds of 90 miles per hour, at first in a 35 miles per hour zone, were needed to catch the appellant. Probable cause for arrest does not require the quantum of proof necessary to convict. *United States v. Ventresca*, 380 U.S. 102 (1965). Under the standards governing Deputy White's conduct, "the facts and circumstances within the knowledge of the officer . . . were sufficient to warrant a prudent and cautious man in believing that the arrested person had committed" the offense of speeding. *State v. Fletcher*, 288 A. 2d 92, 97 (Me. 1972) (quoting *State v. Smith*, 277 A. 2d 481, 488 (Me. 1971)).

Appellant next argues that even if Deputy White had probable cause to arrest for speeding that such an arrest would be patently pretextual. This court has stated in the context of traffic arrests that lead to information about more serious crimes:

"[W]hile we do not say that there could never be an egregious situation where an arrest on purely colorable grounds might be held invalid as 'pretextual', *cf. Taglavore v. United States*, 291 F. 2d 262, 265 (9th Cir. 1961), the validity of an arrest is normally gauged by an objective standard rather than by inquiry into the officer's presumed motives. If this were not so, an arrest's validity could not be settled until long after the event; it would depend not only on the psychology of the arresting officer but the psychology of the judge." *United States v. McCambridge*, 551 F. 2d 865, 870 (1st Cir. 1977).

We acknowledge that *McCambridge* is distinguishable from the instant case insofar as the arresting officer in *McCambridge* had no suspicions about more serious crimes at the time of the traffic arrest. Nevertheless, we feel that founded suspicions that a person has committed one crime do not disable an officer from making a probable cause arrest based upon the operation of a vehicle during guilty flight from the officer's reasonable attempts to question that person. The Fifth Circuit has upheld a traffic arrest on facts very similar to those in the present case. *United States v. Maslanka*, 501 F. 2d 208, 213 n. 10 (5th Cir. 1974). We agree with its reasoning that a traffic arrest after a high speed chase, even where the cause of the chase is founded suspicion of a more serious crime, is clearly distinguishable from the case of officers having mere suspi-

cions who carefully lie in wait until a minor traffic infraction gives them a pretext to confirm their suspicions. In the same vein, the cases cited by appellant to support his "pretext" argument (e.g., *United States v. Montgomery*, 561 F. 2d 875 (D.C. Cir. 1977) involved officers acting without articulable facts to support any suspicion and using registration checks (not arrests for crimes) as pretexts for searches. As explained more fully below, Deputy White had numerous facts to support his suspicions, had every reason to give chase, and in the process was presented with completely independent probable cause to arrest for speeding.

Even if our construction of Maine traffic statutes should prove faulty, we think that Deputy White nevertheless had probable cause to arrest appellant — for drug trafficking. Viewed in isolation, the individual facts known to the deputy may have been consistent with innocent explanations, but taken as a rapidly-developing whole, the facts justifying appellant's apprehension were consistent with good, constitutional police work.⁹ The deputy knew that a large yacht had recently been purchased, for cash in small denominations, by a man who had asked for two receipts showing different prices for the boat. He could reasonably infer that not only did the new owner not want to be traced but also that the new owner wanted to deceive someone about the amount of cash he had available. White knew that the new owner had recently installed expensive long range navigation equipment in a sloppy fashion. He could reasonably infer that the owner planned to or had made an ocean voyage and was in a hurry. On that

⁹We note in passing that, unlike the state law relating to most warrantless arrests, the special statute then governing warrantless arrests for drug possession and trafficking did not require the offense to be committed in the presence of an officer. See 17-A M.R.S.A. § 1113 (West Supp. 1978) (repealed by P.L. 1978 ch. 671 § 26). State law governing Deputy White's authority to arrest without a warrant expressly required only probable cause.

boat was a chart showing a course approaching Mill Isle, a secluded location with a deep water harbor suitable for smuggling and located near an area already under investigation as a smuggler's port, plus evidence of recent use of small amounts of marijuana, not in and of itself a crime but grounds to support an inference that the boat was involved with drug traffic. This suspicious craft had been abandoned at night at an unauthorized mooring and had been unclaimed for more than 24 hours. Then the owner arrived. Rather than investigate the presence of uniformed officers on the vessel he had so carelessly left behind, the owner sped away in what can only be characterized as guilty flight. Finally, upon seeing a uniformed officer observing him in Georgetown Center, the owner once again fled the authorities, speeding down a winding road past the entrance to the marina. At this point, Deputy White had not seen more than 1½ ounces of marijuana associated with the defendant,¹⁰ but these facts were sufficient to warrant a reasonable and prudent man's belief that appellant had been engaged in "furnishing" under 17-A M.R.S.A. § 1106(3), if not a more serious crime.

Attempting to minimize the cumulative impact of these facts, appellant cites cases holding that arrest at an airport of persons meeting the DEA's "drug courier profile" is not supported by probable cause. See *United States v. McCaleb*, 552 F. 2d 717 (6th Cir. 1977). The simple answer to appellant's contention is that this case presents "profile plus". "The element missing in *McCaleb* and present in the case at bar is a reasonably inferred tie-in with unlawful trading in narcotics." *United States v. Canales*, 572 F. 2d 1182, 1186 (6th Cir. 1978) (finding founded suspicion for *Terry* stop). Had the defendants in *McCaleb* been associated with a suspected smuggling

¹⁰Possession of less than 1½ ounces of marijuana is not a criminal offense under Maine statutes. 22 M.R.S.A. § 2381.

operation and then twice fled from the authorities, we feel certain that the resolution on the probable cause issue would have been different. The importance of flight or other behavior signifying guilt as a final link in a chain of probable cause is underscored in a number of cases. See *United States v. Maslanka*, *supra*; *Defino Martone v. United States*, 396 F. 2d 229 (1st Cir. 1968); *United States v. Brown*, 457 F. 2d 731 (1st Cir. 1972); *United States v. Berkowitz*, 429 F. 2d 921 (1st Cir. 1970).

C. *The Fruits of the Blazer*

Appellant next objects to the admission of evidence seized from his vehicle while it was parked at the marina. As explained above, upon reaching the marina in the company of Deputy White, appellant left his truck and boarded the COLD DUCK. There he had a lengthy conversation with DEA Agent Drinan. Deputies White, Kinney, and Setlar remained in the lot, admiring the truck. Appellant had left the door open on the driver's side. The deputies observed marijuana debris on the carpeting. The deputies closed and locked the truck and apprised Agent Drinan of their observations. After discussing the possible penalties for smuggling with appellant, Drinan seized the COLD DUCK. Drinan and appellant then left the boat and appellant unlocked the truck. Drinan searched four suitcases found in the back of the vehicle. Having discovered hashish in one of the suitcases, Drinan placed appellant under formal arrest and seized the vehicle. A thorough search of the vehicle ensued and yielded a key, which was later found to fit one of the locks on Mill Isle. Appellant objects to the admission of the debris, the hashish found in the suitcase, and the key. We treat each item separately.

1. The Marijuana Debris

Appellant's arguments on this issue give us little difficulty. Appellant had a very limited expectation of privacy in his truck. *Chambers v. Maroney*, 399 U.S. 42 (1970). Appellant completely eliminated any such expectation by leaving the door open. Any passerby could have seen the marijuana on the floor of his truck. The trial court expressly found that the deputies were not attempting to search the vehicle. Appellant does not contend that the deputies were not lawfully present outside his vehicle. Therefore, the discovery of the marijuana debris falls squarely within the plain view exception. See *Coolidge v. New Hampshire*, *supra*.

2. The Suitcases

The Supreme Court's decision in *United States v. Chadwick*, 433 U.S. 1 (1977), establishes that the presence of luggage in an automobile does not necessarily vitiate expectations of privacy that attach to the contents of the luggage. Accordingly, the government has not argued that the search of appellant's luggage was permissible under either the "search incident" or the "automobile" exception. Rather, the government argues, and the trial court found, that appellant consented to the search of the luggage.

The existence of consent and the voluntariness thereof are questions of fact to be determined from all the circumstances surrounding the search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 246-47 (1973). A trial court's finding of voluntary consent will not be reversed unless it is clearly erroneous. *United States v. Cepulonis*, 530 F. 2d 238, 243 (1st Cir.), *cert. denied*, 426 U.S. 908 (1976). Although we find the issue of consent-in-fact, as opposed to the voluntariness thereof, to be a close one, we find no clear error here.

As discussed more fully below, the circumstances surrounding the search of the suitcases had few, if any, of the inherently coercive characteristics that negate a finding of voluntariness. See *United States v. Watson*, 423 U.S. 411 (1976); *Schneckloth v. Bustamonte*, *supra*. Because appellant never expressly consented to the search, however, we are faced with the more difficult question of when consent may be inferred from action. Appellant urges us to adopt the standard espoused in *United States v. Abbott*, 546 F. 2d 883 (10th Cir. 1976). *Abbott* held that the acts from which consent is inferred must be "unequivocal and specific". *Id.* at 885. Because the *Abbott* court selected this evidentiary standard while characterizing consent to search as a "waiver of a fundamental right" (*id.*), a characterization and a mode of analysis expressly rejected in *Schneckloth v. Bustamonte*, *supra*, we are not convinced that the trial court's conclusion should be subjected to such close scrutiny. Indeed, in *United States v. Cepulonis*, *supra*, 530 F. 2d at 244, we deferred to the trial court's resolution of equivocal evidence of consent. Nevertheless, even if we apply, *arguendo*, the "unequivocal and specific" standard, we think that the inference of consent was proper on the facts of this case. Appellant's conversation with Drinan aboard the COLD DUCK was relaxed and casual. Appellant was cooperative, and when he did not wish to be helpful he clearly drew the line. Upon returning to the parking lot, appellant unlocked the truck for Drinan.¹¹ Simply unlocking a vehicle,

¹¹ Defendant argues at length that the trial court was clearly erroneous in finding that appellant unlocked both the door and the trunk of the vehicle. We note that the record supports appellant's contention that appellant unlocked the door and Drinan the rear hatch of the Blazer. Appellant's arguments are irrelevant, however, for two reasons. First, appellant's vehicle, a van without a separate trunk, was opened from stem to stern when he unlocked one door. More important, cooperation in opening any one of the routes into the vehicle is, in our view, just one piece of evidence amongst many that support an inference of consent-in-fact.

without saying a word, has been held sufficient to support an inference of consent-in-fact. *United States v. Almand*, 565 F. 2d 927 (5th Cir.), *cert. denied*, ___ U.S. ___, 47 U.S.L.W. 3199 (1978). Even if, however, the act of unlocking a vehicle, without more, might not support an inference of consent to search luggage contained therein, appellant's act in this case does support the ultimate finding of consent-in-fact.

More important than the foregoing prelude to the search of the suitcases is appellant's behavior at the time of the search. Agent Drinan first removed the four suitcases from the Blazer. Then, before attempting to open each one, the agent asked appellant if he owned the bag. In each case, appellant denied both ownership and any knowledge of the owner of the bag. The first three bags were unlocked and their contents unincriminating. The fourth had a combination lock. Although denying ownership, the appellant stated that he thought he could unlock it and proceeded to do so. Given appellant's demonstrated ability to choose whether or not to cooperate, we think that the disclaimer of any knowledge or interest in the luggage together with the unlocking of the incriminating bag clearly support an inference of consent-in-fact. We find support for this holding in the rule adopted by the Fifth and Ninth Circuits that one who denies any interest in luggage has abandoned the property and thereby loses any standing to challenge an ensuing search. See *United States v. Jackson*, 544 F. 2d 407 (9th Cir. 1976); *United States v. Anderson*, 500 F. 2d 1311 (5th Cir. 1974); *United States v. Colbert*, 474 F. 2d 174 (5th Cir. 1973) (en banc). Although we are not convinced that the property law analysis of abandonment ought to be applied where the issue is a reasonable expectation of privacy (see *Katz v. United States*, *supra*), we reach the same result by reasoning that one who disclaims any interest in luggage thereby disclaims any concern about whether or not the contents of the luggage remain private. See *United States v.*

Berkowitz, 429 F. 2d 921, 925 (1st Cir. 1971) (disclaimer of interest in allegedly stolen goods vitiates any Fourth Amendment interest in goods).

Finally, we find support in our holding in *Robbins v. MacKenzie*, 364 F. 2d 45 (1st Cir.), *cert. denied*, 385 U.S. 913 (1966), that opening and stepping away from the door to an apartment is implied consent to entry and observation by a police officer who knocks.¹² Nor does appellant's citation of *United States v. McCaleb*, *supra*, persuade us to the contrary. *McCaleb* held that the act of unlocking a suitcase will not support an inference of consent. *McCaleb* involved an illegal stop based upon a "drug courier profile" and an illegal detention for questioning in unfamiliar surroundings. Moreover, the agents in *McCaleb* misrepresented their authority to obtain a warrant to open the suitcase. Such circumstances are inherently coercive (*see Watson v. United States*, *supra*). Such are not the circumstances of this case. The finding of consent-in-fact was not clearly erroneous.

Many of the factors that support an inference of consent also support the finding of voluntariness. Accordingly, we discuss them only briefly here. Appellant is a man of average education and intelligence. He demonstrated his ability to use that intelligence to avoid incriminating himself in his discussions with Drinan. Appellant had been informed of, and indicated his understanding of, his *Miranda* rights twice before the suitcase search. No lengthy detention or physical abuse was involved. Rather, although we have held that appellant was technically under arrest when asked to return to the marina,

¹² Indeed, the evidence supporting an inference of consent is stronger in this case than it was in *Robbins*. In *Robbins* the officer and the occupant exchanged no words. In this case, Agent Drinan asked appellant if he could open the combination lock and appellant replied that he would try. Such a response is closely akin to the express permission to enter that the dissent felt should be required in *Robbins*. 364 F. 2d at 52-54 (Coffin, J., dissenting).

the atmosphere of his "detention" had none of the coercive aspects involved in questioning at the stationhouse. *See Watson v. United States*, *supra*, 423 U.S. at 424. In short, all of the criteria of voluntariness set forth in *Schneckloth v. Bustamonte*, *supra*, were met here.¹³

3. The Key

Having arrested appellant for possession of the hashish found in the locked suitcase, Agent Drinan seized the Blazer under the authority of the forfeiture statutes, 21 U.S.C. §§ 878(4) & 881(b)(1)(4). The Blazer was then immediately searched. We think that the key found in the Blazer was appropriately seized as evidence revealed during an inventory search.

In *South Dakota v. Opperman*, 428 U.S. 364 (1976), the Supreme Court reaffirmed the right of the authorities to search the interior of a seized vehicle in order to secure personal property contained therein. Such a search protects both the owner and the police. If such a search reveals evidence, the police may seize it. *Harris v. United States*, 390 U.S. 234 (1968); *United States v. McCambridge*, *supra*, 551 F. 2d at 870-71. Appellant objects, however, that the seizure of the key transmutes the inventory search into an investigatory search.¹⁴ Appellant reasons that because the key was not obvi-

¹³ We are not convinced by appellant's argument that Drinan coerced consent by asking appellant to cooperate and by pointing out the possible maximum sentences for smuggling. In *United States v. Race*, 529 F. 2d 12 (1st Cir. 1976), we held that an hour-long negotiation with the prosecutor prior to consenting to search did not eliminate the voluntariness of that consent. Nor did Drinan's assertion that he would seek a warrant if appellant did not consent to make consent involuntary. "Bowing to events, even if one is not happy about them, is not the same thing as being coerced." *Robbins v. MacKenzie*, *supra*, 364 F. 2d at 50.

¹⁴ Appellant does not object to the method of the search and we therefore need not reach the government's argument that seizure pursuant to a

ously criminal evidence and became evidence only when the officers found that it fit the door to the main house at Mill Isle ten days later, the use of the key was investigatory and therefore exceeded the bounds of the caretaking function countenanced by *South Dakota v. Opperman, supra*.

In our view, appellant is quibbling with Agent Drinan's decision that the key might be relevant to prove the charge for which appellant was arrested — possession and transportation of drugs. We think *Cooper v. California*, 386 U.S. 58 (1967), is dispositive of this claim. In *Cooper*, the defendant was arrested for selling heroin and his car forfeited for transporting contraband. A warrantless search of the glove compartment of the seized auto revealed a scrap of brown paper similar to, but larger than, scraps used to wrap heroin allegedly sold by the defendant. The Supreme Court approved the seizure of the paper as reasonably related to the arrest and the purpose of the forfeiture. In other words, the scrap of paper could be probative of the charge against the defendant and the vehicle.

In a similar vein, appellant in this case was arrested for possession and his two vehicles seized for transporting contraband. Unlike the paper in *Cooper*, the key may not have been obviously evidence when agent Drinan first took it into custody. Nevertheless, it became obvious evidence before the reasonable process of an inventory search was completed. Pursuant to DEA regulations, Drinan removed all personal property not a part of the seized vehicle. Long before he had an opportunity to write out an inventory of the vehicle's contents and return them, the discovery of the cache at Mill Isle made it highly likely that the key was evidence. Marijuana debris on the floor of the seized vehicle indicated a likelihood that appellant had carried more contraband than was found in

forfeiture statute permits a full-blown investigatory search of a vehicle. See *United States v. Johnson*, 572 F. 2d 227 (9th Cir. 1978).

the Blazer. The vacuum cleaner and the tire tracks indicated that appellant and the Blazer were associated with Mill Isle. Even before the discovery of the cache, Drinan learned that appellant was not living at his stated address. If a man falsely states his address and other evidence indicates he is living at the scene of a crime for which he had been arrested, his house key is obviously evidence. Were the law to require that officers, legitimately in possession and legitimately made aware of the evidentiary value of such an item, go through the motions of obtaining a warrant, it would, we think, be a purely ritualistic deference to formality. We see no increased protection which would thereby be assured a suspect's rights. We therefore hold that the key was properly seized as evidence discovered during an inventory search.

D. *The Warrantless Search of Mill Isle*

With appellant securely ensconced in a cell in the Sagadahoc County Sheriff's Office, Agent Drinan and Deputies Brawn and Setlar drove to appellant's Woolwich address. They found an empty house and neighbors who told them that "Jackie" had moved out several weeks earlier. Recalling the course marked on the chart found on the COLD DUCK, the officers then proceeded to Mill Isle to question the inhabitants about any suspicious activities they might have observed. The officers went first to a chalet, the smaller and more remote of two dwellings on the island, and observed marijuana debris covering the dock adjacent to the chalet. After finding no one in at the chalet, the officers then proceeded via a dirt road across the island toward the main house. On the way, they observed tire tracks leading off the road toward a tarpaulin. Twist ties for plastic bags and marijuana debris surrounded the tarpaulin. Under it was a bale of marijuana.

Appellant's attack upon the warrantless seizures involved here is based upon an assertion that a privacy expectation surrounded the entire Mill Isle property and that the authorities violated that interest by going to the farthest reaches of the property to search. Our first problem with this argument is that not only was the property not posted, but the trial court expressly found that the officers entered the property to inquire of the residents about the COLD DUCK, not to search. This finding was based upon uncontroverted testimony. Given the trial court's unique opportunity to evaluate the credibility of witnesses, we cannot upset the finding of the intent of the officers.

Where an owner has not attempted to secure open fields and woods from "invasion" by a casual, or an official, visitor, a police officer may cross private land in order to question the inhabitants of dwellings thereon. *United States v. Hersh*, 464 F. 2d 228 (9th Cir.), *cert. denied*, 409 U.S. 1008 (1972); *United States v. Knight*, 451 F. 2d 275 (5th Cir. 1971); see *Patler v. Slayton*, 503 F. 2d 472 (4th Cir. 1972) (no privacy interest in unposted target range behind farm). The land involved here was not posted; there was no fence or chain to impede visitors; the officers approached openly in broad daylight. Thus, the entry was permissible. See *United States v. Hersh*, *supra*; *United States v. Brown*, 457 F. 2d 731, 733 (1st Cir. 1972) (entry upon land to investigate reports of abandoned vehicles in woods and to inquire of inhabitants permissible). The cases cited by appellant to the contrary all involved an impermissible initial intent to search. *E.g.*, *United States v. Holmes*, 521 F. 2d 859 (5th Cir. 1975).

The trial court also credited testimony and physical evidence showing that the approach to the chalet put the dock in plain view and that the discovery of the marijuana debris on the dock was inadvertent. We have no basis to overturn these findings. The trial court also found that despite the officers'

attempts to look in the windows of the chalet, the officers' continued observations did not become a search. Although as an original matter we might be quite suspicious of continued wanderings that revealed more evidence in "plain view" (*cf. Coolidge v. New Hampshire*, *supra*), there is ample evidence to support the trial court's finding that the officers crossed the island solely to inquire at the main house.

Assuming, as we must, that the trip across the island was permissible, the bale of marijuana discovered in plain view beside the road was properly seized. As in *Patler v. Slayton*, *supra*, (spent bullets dug out of target range in open field), the appellant could not reasonably expect privacy when he left a bale of marijuana in the open, even under a tarpaulin. If no expectation of privacy was reasonably involved, there was no search. See *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974); *United States v. Freie*, 545 F. 2d 1217 (9th Cir. 1976), *cert. denied sub nom. Gangadean v. United States*, 430 U.S. 966 (1977) (stack of cartons containing marijuana under tarpaulin in plain view from airfield; no search); *United States v. Pruitt*, 464 F. 2d 494 (9th Cir. 1972). In *Pruitt*, the appellants had no reasonable expectation of privacy in marijuana stuffed in duffel bags and hidden under bushes. The court noted: "Any casual passerby would feel perfectly free to ascertain what it was that he had found. The only justified expectation of those who had secreted the marijuana was that the cache would remain secure against intrusion only so long as it remained undiscovered." *Id.* at 496. *Pruitt* did not involve a private road across private land. Nevertheless, because the appellant made no attempt to secure his open land from unwanted visitors, we find that the same analysis applies to these facts where the marijuana lay beside a

road, a quarter mile from any habitation, and surrounded by twist ties and marijuana debris.¹⁵

ADMISSION OF APPELLANT'S STATEMENTS

Appellant objects to the admission of two statements as violative of his Fifth Amendment rights.¹⁶ He first objects to the admission of his colloquy with Agent Drinan during the drive from Bath to Portland. The trial court found a number of facts supporting its conclusion that appellant's admissions were voluntary. Such facts stand unless clearly erroneous. *United States v. Jobin*, 535 F. 2d 154, 156 (1st Cir. 1976). Appellant had been advised of his right to remain silent three times before he made incriminating statements. He had indicated his understanding of those rights. Although appellant refused to sign the printed waiver form, there are no facts tending to show that he had the misimpression that failure to sign immunized his statements. Thus, the concerns we expressed in *United States v. Van Dusen*, 431 F. 2d 1278 (1st Cir. 1970), are not present here.

Appellant argues that his statements could not have been voluntary because he was repeatedly questioned. We note from the record, however, that Agent Drinan ceased question-

ing whenever appellant indicated he did not want to answer. Moreover, Drinan renewed his questioning only when new evidence revealed that there was a large scale operation afoot and that appellant was the key to that operation. Such is good police practice, not impermissible coercion. The trial court found on an ample record that appellant never asked that all questions cease or that he be represented by counsel. Rather, he picked those questions he wanted to answer and declined others. Such evidence not only demonstrates a knowledge of the right to remain silent but also the intelligence and will to vindicate that right. Appellant was not subjected to physical abuse or deprivation of food or nourishment. Indeed, it was just after a light meal that appellant himself initiated the conversation in which he incriminated himself. There was no error in the trial court's finding of voluntary waiver.

Appellant next objects to the use at trial of his statement at his bail hearing that his residence was Mill Isle. Appellant's theory is that he was forced to make an unconstitutional choice between two fundamental rights, the right to remain silent when admission of any connection with Mill Isle would incriminate him and the Eighth Amendment right to release on bail under reasonable conditions. Our answer is threefold. First, appellant did not have an unconditional constitutional right to release on bail. *United States v. Abrahams*, 575 F. 2d 3 (1st Cir.), *cert. denied*, U.S. , 47 U.S.L.W. 3198 (1978). Thus, the right he places in balance here is different from the Fifth and Fourth Amendment rights held in balance in *Simmons v. United States*, 390 U.S. 377 (1968) (Fifth Amendment requires exclusion of testimony at suppression hearing to establish standing to raise Fourth Amendment challenge). Second, the appellant has not shown us that exercise of his Fifth Amendment rights at the bail hearing would have re-

¹⁵ Appellant's last search and seizure argument does not merit discussion in the text. Few of appellant's minute objections to allegations in the affidavit seeking a warrant to search Mill Isle were properly preserved below. Those few objections properly raised below involve allegations that were neither intentional nor material misstatements. See *Franks v. Delaware*, U.S. , 46 U.S.L.W. 4829 (1978).

¹⁶ We need not address appellant's arguments that his admissions were the tainted fruit of illegal searches and seizures (see *Wong Sun v. United States*, 371 U.S. 471 (1963)) because we have found the evidence involved was legally obtained.

sulted in denial of release.¹⁷ The length of residence in the community is only one of many factors taken into consideration in establishing the terms of release in the discretion of the magistrate. 18 U.S.C. § 3146(b).

Finally, "[t]he criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow . . ." *McGautha v. California*, 402 U.S. 183, 213 (1971). Given the limited nature of the Eighth Amendment "right" the appellant feared he might lose by remaining silent, we can say, as we have said on very similar facts: "the right not to speak embodied in the Fifth Amendment is not equivalent to a right to volunteer information to the government under a grant of immunity." *Flint v. Mullen*, 490 F. 2d 100, 102 (1st Cir. 1974). See *Spinelli v. United States*, 382 F. 2d 871, 891-92 (8th Cir. 1967), *rev'd on other grounds*, 393 U.S. 410 (1969) (no exclusion of bail-hearing testimony on residence even though information on residence both essential to bail and incriminating).

OTHER CRIMES EVIDENCE

Appellant lists under this general heading three separate challenges to the admission of evidence and prosecutorial argument based thereon. The only challenge fully preserved by objections in the district court is to the admission of testimony about his purchase of another yacht, the HARVARD, four days before his arrest. Appellant claims such testimony was impermissible other crimes evidence. F. R. Evid. 404(b).

¹⁷ We reject as untenable appellant's argument that he did not knowingly waive his right to remain silent at the bail hearing. He was represented by counsel and the magistrate warned him that anything he said could be used against him.

The government argues that appellant's purchase of the HARVARD, a boat admittedly not involved in importing marijuana found at Mill Isle, was probative of his *modus operandi* and therefore of his identity as the smuggler at work at Mill Isle. We are not convinced that buying boats is a sufficiently unique act to counterbalance the prejudice arising from the government's inference that appellant was in the business of smuggling, a crime with which he was not charged. See *United States v. Myers*, 550 F. 2d 1036, 1045 (5th Cir. 1977) (analyzing the uniqueness and similarity of uncharged offenses necessary to make them probative of the identity of the perpetrator of the act charged); *United States v. Eatherton*, 519 F. 2d 603, 611 (1st Cir. 1975); *United States v. Barrett*, 539 F. 2d 244, 248 (1st Cir. 1976). Although the balancing of prejudice and probative value is primarily the task of the trial court, *United States v. Eatherton*, *supra*, 519 F. 2d at 611, we would be sorely pressed if the HARVARD were relevant only to method of operation. Such is not the case. A receipt for the HARVARD, showing appellant's name along with two others as purchasers, was found at Mill Isle. Given the proximity in time of the purchase and the importation (a few days apart at most) and given the necessity of marshalling evidence to link appellant with Mill Isle, see *United States v. Byrd*, 352 F. 2d 570, 574 (2nd Cir. 1965), the trial court did not abuse its discretion.

Appellant next challenges the admission of evidence of the street value of the marijuana seized at Mill Isle. We note that street value is relevant to prove intent to distribute. *United States v. DiNovio*, 523 F. 2d 197, 202 (7th Cir. 1975); *United States v. Hollman*, 541 F. 2d 196, 200 (8th Cir. 1976). Appellant's argument that such proof was unnecessary given the tonnage involved and was therefore excludable because of its prejudicial impact (see *United States v. Hollman*, *supra*) might stir us if appellant had given the trial court an oppor-

tunity to balance prejudice and probative value. F. R. Evid. 403. Appellant's stated objection, however, was to the relevance of street value and the hearsay nature of Agent Drinan's testimony on the subject. Appellant did not assert that any potential probative value of street value evidence might be outweighed by its prejudicial impact. Moreover, having failed to alert the trial court to the task at hand, appellant now declines to favor us with an argument concerning plain error. We see no plain error and reject this challenge.

Appellant's final evidentiary challenge, to prosecutorial argument based upon evidence of appellant's financial transactions prior to his arrest, merits even less consideration. Although appellant made one objection to "other crimes" inferences in the government's opening statement, he did not object to the admission of the evidence nor did he request a curative charge. Again, appellant's counsel knows that we must apply a plain error standard here, but argues as if his present position had been fully preserved below. There is no plain error.

SUFFICIENCY OF THE EVIDENCE OF IMPORTATION

We have recently restated the law and the authorities relating to the sufficiency of the evidence supporting a jury verdict in a criminal case. We evaluate the evidence in the light most favorable to the prosecution, with all inferences that may legitimately be drawn; the evidence need not exclude every reasonable hypothesis of innocence so long as the total evidence permits a conclusion of guilt beyond a reasonable doubt. *United States v. Gabriner*, 571 F. 2d 48, 50 (1st Cir. 1978). We think the prosecution has met this standard.

Appellant argues at length that three decisions overturning jury verdicts on importation charges require that we reverse.

The cases, *United States v. Maslanka*, 501 F. 2d 208 (5th Cir. 1974), *United States v. Carrion*, 457 F. 2d 200 (9th Cir. 1972), and *United States v. Meyer*, 432 F. 2d 1000 (9th Cir. 1970), clearly stand for the proposition that mere possession of imported contraband is not sufficient to support a conviction for importation. Indeed, in *Carrion* the court held that a pilot who lands in Los Angeles with a plane load of marijuana in packages marked with Spanish writing cannot be convicted of importation, even though he had burned enough fuel for a round trip to Mexico and had a matchbook from a Mexican restaurant in his pocket. Without commenting on the severity of this review of a jury's findings, we hold that *Carrion* and the other cases cited by appellant are distinguishable. In none of the cited cases did the defendant confess to importation. In the case at bar, appellant admitted that the marijuana at Mill Isle represented his "first run" and that what he had run was high quality marijuana from Colombia. Moreover, appellant was found in possession of Colombian-packaged marijuana on the coast of Maine, unlike the southwesterners found in possession of foreign items common within their area of the United States. Finally, the government presented evidence of long range planning in the form of boat and land purchases by the defendant. These facts, together with the size of the operation at Mill Isle and appellant's admission that the cache at Mill Isle was only part of his "run" permit a conclusion of guilt beyond a reasonable doubt.

THE CHARGE ON REASONABLE DOUBT

Fueled by our recent decision in *Dunn v. Perrin*, 570 F. 2d 21 (1st Cir. 1978), appellant vigorously challenges the trial court's explanation of the concept of reasonable doubt. Unfortunately, appellant failed to include any mention of this

portion of the charge when raising a plethora of exceptions before the trial court. Given the marginal merit of appellant's challenges to specific language drawn out of context and the correctness of the charge taken as a whole, we have no difficulty concluding there is no plain error here.

SENTENCING

Appellant's last claim is that the trial court based its decision to impose maximum sentences on all counts upon legally impermissible considerations. The court was candid about its reasoning, which we set out in full in the margin.¹⁸

¹⁸"In determining the sentences appropriate in this case, this Court has considered with care the very comprehensive and thorough presentence report prepared for its consideration; it has considered the statement very ably made by the United States Attorney as to the factors which this Court should appropriately consider, and also has, of course, considered the very able statement by the defendant's counsel, Mr. Petruccelli.

"The Court has also had the benefit of having personally presided at the trial of this defendant as a result of which the Jury returned its unanimous verdict of guilty under all three counts of the Indictment.

"At the outset, the Court is wholly convinced that the Jury arrived at the only verdict which it could have arrived in this case. There is not the slightest doubt in the mind of this Court of this defendant's guilt of all three of the charges in this Indictment. The Court is further concerned because in light of all the information concerning the defendant which has developed at the trial and in the subsequent investigation, it is entirely evident that this defendant is simply the tip of the iceberg; that he is one in what unquestionably must have been and very possibly may still be a very substantial criminal operation directed toward the importation of Marijuana and very possibly other elicit [sic] drugs into this country through the coastline of the State of Maine.

"This Court cannot in determining the sentence appropriate in this case close its eyes to the fact that the defendant, despite the overwhelming evidence of his guilt, continues to deny guilt. The first step in rehabilitation, whether it be in an institution or probationary sentence setting, is, of course, the defendant's full, frank and complete admission that he has done wrong and is prepared to do better in the future.

Appellant concedes that as a general rule sentencing decisions are within the exclusive discretion of the trial court. *Marano v. United States*, 374 F. 2d 583, 586 (1st Cir. 1967). There are, however, two established exceptions to this rule, where the trial court employs impermissible considerations in fixing sentence (*see Id.*, *LeBlanc v. United States*, 391 F. 2d 916 (1st Cir. 1968)) and where the trial court refuses to "individualize" the sentence, basing it instead upon mechanistic application of rules unrelated to the defendant's character. *See United States v. Wardlaw*, 576 F. 2d 932 (1st Cir. 1978); *United States v. Foss*, 501 F. 2d 522, 527 (1st Cir. 1974). Appellant claims that the trial court's focus upon his failure to confess and cooperate in apprehending his confederates placed an impermissible "price tag" upon his exercise of his rights to not to incriminate himself and to appeal his conviction. *See United States v. Rogers*, 504 F. 2d 1079, 1084 (5th Cir. 1974). We do not agree.

"The Court also can't close its eyes to the fact that the defendant has consistently declined to co-operate in any way with the prosecuting and investigating officials in their efforts to bring into Court all of those who are involved in this very substantial operation. The sums of money involved in this operation, as disclosed at the trial, [are] clearly beyond any capacity of this particular defendant before the Court. He is undoubtedly aware of the sources of those funds. He has consistently declined and refused to co-operate in determining what that source may be.

"The Court is, of course, aware that the defendant is under no obligation to in any way incriminate himself. He was entitled to a trial. He has had a fair trial. His guilt has been determined. The Court feels compelled to impose the maximum prison term provided by the statutes for each of the three counts in this Indictment, in two instances including the special parole term of at least two years required by the applicable statute. The Court has considered the possibility of a young adult sentence under the Federal Youth Corrections Act, but in light of the magnitude of this offense, the defendant's evident sophistication, including, if the Court has previously not mentioned, his prior criminal record, the Court does not feel he is an appropriate subject for treatment under the Act."

As an initial matter, we recognize that there is a difference of opinion amongst the circuits concerning the extent to which a trial court may rely upon a defendant's failure to "repent" and "sing" when fixing sentence. Compare *United States v. Rogers, supra*, and *United States v. Garcia*, 544 F. 2d 681 (3d Cir. 1976), and *Scott v. United States*, 419 F. 2d 264 (D.C. Cir. 1969), with *United States v. Vermeulen*, 436 F. 2d 72, 76 (2nd Cir. 1970), and *United States v. Chaidez-Castro*, 430 F. 2d 766, 770 (7th Cir. 1970), and *Gollaher v. United States*, 419 F. 2d 520, 530 (9th Cir. 1970). We note, however, that many of the cases aligned on either side of the divide involved a sentencing court's attempt to bargain with the defendant, expressly conditioning a reduced sentence upon confession or cooperation. See, e.g., *United States v. Rogers, supra*; *United States v. Chaidez-Castro, supra*. We need not and do not reach the question of the permissibility of such open bargaining.

We have, however, recognized that open bargaining with the defendant may indicate that the trial court is punishing the defendant for failing to confess his misdeeds and have found such punishment grounds to vacate sentence. See *LeBlanc v. United States, supra*. Moreover, we have expressed concern in another context that a defendant's utilization of his right to appeal and retrial cannot carry the "price tag" of the risk of increased sentence based upon a reevaluation of the culpability of his acts. *Marano v. United States, supra*, 374 F. 2d at 585. We perceive a distinction, however, between punishing a defendant for maintaining his innocence and preserving his right to appeal — whether that punishment be expressly or subtly imposed — and merely considering a defendant's failure to recant when evaluating his prospects for rehabilitation without incarceration. The trial court in the case at bar expressly recognized the appellant's right to remain silent and framed its remark about appellant's failure to confess in the context of evaluating his prospects for rehabilitation. We think the con-

sideration of defendant's attitude was permissible (see *Gollaher v. United States, supra*) and represented the sort of individual consideration we found lacking in *United States v. Wardlaw, supra*.

We recognize that it may be difficult if not impossible in some cases to distinguish between permissible evaluation of the defendant's character and impermissible punishment for failure to confess. In *United States v. Grayson*, ___ U.S. ___ 46 U.S.L.W. 4840, 4843 (June 26, 1978), the Supreme Court faced a similar dilemma, whether to allow a sentencing judge to consider a defendant's prevarication at trial when that consideration might disguise an impermissible punishment for the uncharged crime of perjury. The Court decided that the trial judge's need and responsibility "to consider the defendant's whole person and personality" at sentencing should prevail. *Id.* We think the same consideration applies here.

Appellant's challenge to consideration of his failure to cooperate follows from and falls with the confession issue. Consideration of failure to cooperate with authorities is certainly germane to an evaluation of a defendant's attitude toward society. It is only objectionable insofar as cooperation entails admitting the crime charged. As with the confession issue, we think the sentencing court in the case at bar permissibly considered failure to cooperate as an element of character and was not punishing defendant for exercising his Fifth Amendment rights.

In addition to the general context of the allegedly objectionable statements, *i.e.*, the prospects for rehabilitation, two aspects of the trial court's statement support our conclusion that there was no impermissible encroachment upon Fifth Amendment rights here. First, the court specifically mentioned the magnitude of the offense and the defendant's prior criminal record as influencing its decision. These considerations were first mentioned in the context of the Youth Correc-

tions Act but in language that strongly suggests the court applied the same considerations in determining sentence as an adult. Indeed, the court thought it had already discussed the prior criminal record. Moreover, the trial court was convinced that appellant had played an important role in a massive violation of the law. A court is unquestionably free to consider the magnitude of the violation charged and the defendant's role in the violation when imposing sentence. The articulation of these additional reasons for maximum sentencing allays any fears we might have that the sentencing decision was tainted by impermissible considerations.

Finally, the trial court's discussion of appellant's failure to cooperate in bringing to justice the members of a continuing smuggling operation immediately followed the government's persuasive plea for a stiff sentence as a general deterrent to a growing problem. Although general deterrence is much criticized and cannot justify "mechanistic" imposition of stiff sentences (*see United States v. Foss, supra*, 501 F. 2d at 527), general deterrence is a permissible consideration at sentencing. *Id.* We perceive such a purpose running as a strong undercurrent throughout the trial court's discourse. We cannot say that considering general deterrence in this situation was an abuse of discretion.

We reiterate in closing that we do not decide today that failure to confess and cooperate may always be permissible bases for sentencing. Rather, in light of the entire context of the sentencing statement, we find that the trial court permissibly considered such behavior as reflecting upon the likelihood of rehabilitation.

Affirmed.